Supreme Court, U.S.
FILED
JUL 26 2007
OFFICE OF THE CLERK

No. 07-113

In the
Supreme Court of the United States

CITY OF CINCINNATI,
Petitioner,

v.

CLEVELAND CONSTRUCTION, INC.,
Respondent.

On Petition for a Writ of Certiorari to the Ohio Court of Appeals, First Appellate District

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether strict judicial scrutiny applies to a municipality's discretionary "lowest and best bid" determination that, as part of a non-exhaustive list of factors, includes permissive consideration of bidders' good faith outreach efforts to use minority-owned and women-owned subcontractors.

LIST OF PARTIES

Petitioner: City of Cincinnati

Respondent: Cleveland Construction, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, City of Cincinnati, Ohio, respectfully prays that a writ of certiorari be issued to review the final judgment of the Court of Appeals, First Appellate District of Ohio, Hamilton County, Ohio.

OPINIONS BELOW

The Entry of the Court of Common Pleas, Hamilton County, Ohio, was filed July 13, 2005.[1] Asserting equal protection deficiencies, that Entry enjoined the City from applying permissive subcontracting outreach requirements used to track bidders' efforts to promote the participation of minority-owned and women-owned subcontractors to the extent of their specified availability.[2] On other issues, the trial court ruled, in part, in favor of Cleveland Construction, Inc. and, in part, in favor of the City of Cincinnati.

By Opinion dated December 8, 2006, the Court of Appeals, First Appellate District of Ohio, Hamilton County, Ohio (herinafter referred to as the "Ohio First District Court of Appeals"), affirmed the Entry of the Court of Common Pleas enjoining the City's subcontracting outreach requirements.[3] In an opinion filed May 2, 2007, the Supreme Court of Ohio accepted the City's appeal for review on due process and damages issues. The Supreme Court of Ohio did not accept the

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[1] App. 53, *et seq.*

[2] App. 74.

[3] App. 11, *et seq.* The First Appellate District also ruled in favor of Cleveland Construction on due process and damages issues.

City's appeal challenging the lower courts' rulings enjoining the City's subcontracting outreach requirements.[4]

JURISDICTION

The jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in part:

> ****nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.

Cincinnati Municipal Code §321-37 requires:

> (a) Selection of Lowest and Best in Award of City Contracts: Except where otherwise provided by ordinance, the city purchasing agent shall award a contract to the *lowest and best* bidder.
>
> * * * * * * *
>
> (c) Factors to be Considered: Other factors that the city purchasing agent *may* consider in determining the lowest and best bid include, *but are not limited to*:
>
> (1) Information concerning the bidder's performance on prior and current contracts with the city; or

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[4] App. pp. 1-6.

(2) Information concerning the bidder's current, past and proposed payment of prevailing wages; or

(3) Information concerning compliance with the "Non-Discrimination in Purchasing and Contracting" rules and regulations issued by the city manager pursuant to CMC Section 321-159; or

(4) *Information concerning compliance with the "SBE Subcontracting Outreach Program" rules and regulations issued by the city manager pursuant to CMC Section 323-31.*

In the event that the selection of the lowest and best bidder is based primarily upon factors 3 or 4 above, the contract award *may* be made subject to the following limitation: the bid may not exceed an otherwise qualified bid by ten (10%) percent or Fifty Thousand Dollars ($50,000.00), whichever is lower.[5]

Cincinnati Municipal Code §321-43 provides:

Bid; Rejection of Bids.

The city purchasing agent, city manager or any other duly authorized contracting officer *may reject any bid for any reason or all bids for no reason if acceptance of the lowest and best bid is not in the best interests of the city.*[6] Where there is reason to believe

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[5] Emphasis added.

[6] Emphasis added.

there is collusion or combination among bidders, the bids of those involved shall be rejected.

Cincinnati Municipal Code §321-67 provides:

Proposal; Rejection.

The city may reject any or all proposals or any item within a proposal for any reason, or reject all proposals for no reason as deemed by the city purchasing agent or designee to be in the best interest of the city.

Cincinnati Municipal Code §321-159 provides:

Non-Discrimination in Purchasing and Contracting.

The city manager shall issue and enforce rules and regulations to carry out the meaning and purpose of a Non-Discrimination in Purchasing and Contracting Program, substantially in conformance with the content of Part II, Section 2, the "Legislative Recommendation Report To The City of Cincinnati" dated December 17, 2002, prepared by Griffin & Strong, P.C., (hereinafter referred to as the "Legislative Recommendation Report"), a copy of which is on file in the office of the Clerk of City Council.

Cincinnati Municipal Code §321-1-A2 provides:

Award.

"Award" shall mean the written notice of a bid or proposal by the city purchasing agent, board or commission or their designee. The written notice may be a separate document or the contract itself prepared

by the city purchasing agent or designee. The city may cancel an award at any time before the execution of the contract without any liability against the city.[7]

Cincinnati Municipal Code § 321-1-B provides:

Best Interest of the City.

"Best interest of the city" shall mean any decision made by the city manager or city purchasing agent or their designee that the officer concerned believes a specific bid may be of benefit to the efficiency or effectiveness of the operation of the city. *This is a matter of discretion and the decision of the officer concerned is final.*[8]

Cincinnati Municipal Code §321-1-M provides:

May.

"May" denotes the permissive.[9]

Cincinnati Municipal Code §323-5 provides:

Rules and Regulations.

The city manager shall issue and enforce rules and regulations to carry out the meaning and purpose of the small business enterprise program authorized by this chapter.

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[7] Emphasis added.

[8] Emphasis added.

[9] Emphasis added.

Cincinnati Municipal Code §323-7 provides:

Program Goals.

(a) The City of Cinc nati's Annual Goal for SBE participation shall be 30% of the city's total dollars spent for construction supplies, services, and professional services. The city of Cincinnati MBE/WBE annual participation goals of 30% construction, 15% supplies/services, and 10% professional services will be monitored, tracked internally, and reported annually to city council along with annual SBE participation rates.

(b) SBE participation is counted as follows:

(1) Once a firm is determined to be an eligible SBE, in accordance with this policy, the total dollar value of the contract awarded to the SBE is counted toward the SBE participation rate.

(2) The City of Cincinnati or a contractor may count toward its SBE rate a portion of the total dollar value of a contract with an eligible joint venture equal to the percentage of the ownership and contract of the SBE partner in the joint venture.

(3) The City of Cincinnati or a contractor may count toward its SBE rate only expenditures to SBEs that perform a "commercially useful function" in the work of a contract. An SBE is considered to perform a "commercially useful function" when it is responsible for execution of a distinct element of the work of a contract and

carrying out its responsibilities by actually performing, managing, and supervising the work involved. To determine whether an SBE is performing a commercially useful function, the City of Cincinnati or a contractor shall evaluate the amount of work subcontracted, industry practices, and other relevant factors.

(4) Consistent with normal industry practices, an SBE may enter into subcontracts. If an SBE contractor subcontracts a significantly greater portion of the work of the contract than would be expected on the basis of normal industry practices, the SBE shall be presumed not to be performing a commercially useful function. The SBE may present evidence to rebut this presumption to the City of Cincinnati.

Cincinnati Municipal Code §323-17 provides:

City Maintained Records and Reports.

(a) The effectiveness of this program will be measured by a review of data indicating prime and subcontract awards to SBEs, MBEs, and WBEs. Program effectiveness measurements will also include efforts by the city of Cincinnati staff to provide prime contracting opportunities for SBEs. At the end of each contract, the office of contract compliance will prepare a report on the utilization of firms in the SBE program. Data in this report will include information on the gross income size of the firms participating on each contract. Each project manager and procurement officer will continuously maintain, and compile monthly,

information relating to the departments' use of SBEs, including information regarding subcontractors and efforts toward SBE program participation. Data on MBE and WBE utilization will be used to determine if there are barriers to their participation which persists despite efforts to assist SBEs.

(b) At the end of a contract, the city shall require a contractor to report to OCC the identity of each SBE to whom the contractor has awarded a subcontract for the purchase of services, professional services, supplies, materials, and equipment.

(c) The city of Cincinnati shall prepare annually a consolidated report based on a compilation and analysis of the reports submitted by each project manager and procurement officer, and information provided by the finance department. This record-keeping system identifies and assesses SBE, MBE and WBE contract awards, prime contractors' progress in achieving SBE subcontract participation, and other SBE development and contracting efforts. Specifically, the OCC in conjunction with all city agencies will maintain records showing:

(1) Awards to SBEs, including names of contractors and subcontractors, nature of the work and services performed, and the percentage of SBE, MBE and WBE participation per contract. The city of Cincinnati will obtain regular reports from prime

contractors on their progress in meeting contractual SBE commitments;

(2) Specific efforts to identify and award contracts to SBEs;

(3) Copies of direct mailings to SBEs;

(4) Pre-bid conference information as it relates to the SBE program;

(5) Requests for assistance from the SBEs interested in bidding or proposing on city of Cincinnati contracts and subcontracts;

(6) Workshops, seminars and training programs conducted for SBEs; and

(7) Efforts to assist SBEs in acquiring bonding and insurance.

(d) The city of Cincinnati staff will submit annual SBE development reports to city council. These reports shall include:

(1) The number of contracts awarded to SBEs, MBEs, and WBEs;

(2) A description of the general categories of contracts awarded to SBEs, MBEs and WBEs;

(3) The dollar value of contracts awarded to SBEs, WBEs and MBEs;

(4) The percentage of the dollar value of all contracts awarded to SBEs, MBEs, and WBEs during the preceding year;

The actual dollar amount paid to SBE, WBE, MBE and non SBE vendors as prime or subcontractors;

The percentage of dollar amount paid to SBE, WBE, MBE compared to the total.

(5) The MBE information will be further desegregated by the following minority group designations as defined in Section 323-1-M1: African American, Hispanic, Asian American, and Native American.

The city of Cincinnati does not discriminate against any company or group of companies in its contracting and procurement activities on the basis of race, color, age, religion, sex, national origin, handicap/disability or veteran status. The SBE opportunity does not propose any numeric goals determined by the rate of program participation by minorities or women, but will require this information at the end of city contracts. The program is designed to include all segments of the region's business community by increasing the competitiveness and profitability of all small businesses as defined within this program.

Cincinnati Municipal Code §323-31 provides:

Subcontracting Outreach Program.

The city manager shall issue and enforce rules and regulations to carry out the meaning and purpose of the Subcontracting Outreach Program, substantially in

> conformance with the content of Part II, Section 1, the "Legislative Recommendation Report To The City of Cincinnati" dated December 17, 2002, prepared by Griffin & Strong, P.C., (hereinafter referred to as the "Legislative Recommendation Report"), a copy of which is on file in the office of the Clerk of City Council.

The City's Small Business Enterprise Program Rules and Guidelines describe the aspects of the subcontracting outreach program related to minority-owned and women-owned firms and their "signficant underutilization:"

> [T]he City seeks to afford its citizens equal opportunities to do business on City contracts and to ensure that all bidders, vendors and contractors ... doing business with the City provide to businesses owned and controlled by racial minorities and ethnic minorities and women, opportunities to participate, to the extent of their availability, on contracts which are paid, in whole or in part, with monetary appropriations from the City of Cincinnati.

STATEMENT OF THE CASE

The Cincinnati Municipal Code provides for "lowest and best" determinations of bids for municipal construction contracts. The City purchasing agent has the discretion to reject any and all bids and the authority to cancel an award at any time before execution of the contract. The Code authorizes the permissive application of a non-exhaustive list of factors that the City purchasing agent may utilize in determining the lowest and best bid for a contract, including a subcontracting outreach program that monitors the proposed

use of minority-owned and women-owned subcontractors by the bidders.

The City began planning for the expansion of its Convention Center in the early 1990s. The City reserved both an overall *project-specific* percentage of the Convention Center work for small businesses and another drywall *contract-specific* percentage for small businesses. That reservation of work for small businesses was race and gender neutral.

In early 2004, Cleveland Construction submitted a bid to the City for the Convention Center drywall contract work. However, Cleveland Construction did not include the specified percentage of small businesses in its bid and the bid was deemed nonresponsive for that reason. The contract was thereafter awarded to another drywall contractor who had met the specific percentage for small businesses. It was uncontroverted that the subcontracting outreach program tracking the use of minority-owned and women-owned subcontractors in bids was not a factor in evaluating the Convention Center drywall contract bids.

On March 30, 2004, Cleveland Construction filed suit for injunctive relief and damages, claiming that the City violated its rights under the Cincinnati Municipal Code and its rights to procedural due process and equal protection. During the proceedings below, the City conceded that its disparity study did not justify remedial race-based or gender-based quotas for the hiring of construction contractors to rectify the effects of past discrimination.[10] The lower courts concluded that there

[10] The City stipulated in the Court of Common Pleas that the part of the subcontracting outreach program tracking minority-owned and women-owned subcontractors included in bids did not satisfy strict judicial scrutiny.

was no evidence that the City's subcontracting outreach program caused Cleveland Construction to be an unsuccessful bidder for the Convention Center drywall work and did not grant Cleveland Construction's equal protection claim for damages. However, the lower courts did enjoin the City from prospectively applying its subcontracting outreach program as part of the list of non-exhaustive permissive factors for determining "lowest and best" bids.

The trial court ruled that the City's subcontracting outreach program "indisputably pressures" contractors to recruit and use minority-owned and women-owned subcontractors. The trial court concluded that the subcontracting outreach program did not satisfy strict judicial scrutiny and that Cleveland Construction prevailed on its facial challenge to the program.[11] Citing decisions from the Ninth, Sixth, and D.C. Circuits, the Ohio First District Court of Appeals affirmed.[12] The Ohio First District Court of Appeals held: "Where regulations pressure or encourage contractors to hire minority subcontractors, courts must apply strict scrutiny."[13]

The Ohio First District Court of Appeals described its rationale: "Where the city's SBE program required documentation of a bidder's specific efforts to achieve the participation of minority subcontractors to the extent of their availability as predetermined by the city, the program undeniably pressured bidders to implement racial preferences."[14] The Ohio First District Court of Appeals also

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[11] App. 69.

[12] App. 22-26.

[13] App. 24.

[14] App. 25.

ruled that "[t]o the extent that the rules pressured bidders to hire women-owned subcontractors, the city was required to demonstrate an "exceedingly persuasive" justification for the differential treatment." The Ohio First District Court of Appeals ruled that the program failed strict or other heightened scrutiny and enjoined its operation.[15]

REASONS FOR GRANTING THE WRIT

I. The Equal Protection Question Presented in This Petition is the Question Left Unanswered in *Parents Involved in Community Schools v. Seattle School District No.1*, 127 S.Ct. 2738 (June 28, 2007).

This Court recently held that "racial classifications" resulting in *mandatory* government decisions based *solely* on race were subject to strict judicial scrutiny.[16] The plurality stated: "It is well established that when the government distributes burdens or benefits *on the basis of* individual racial classifications, that action is reviewed under strict scrutiny."[17] In that case, students were categorically and oversimplistically classified by race, and school placement decisions were made based solely on a student's race. The Court reiterated that "the Government must treat citizens as individuals, not as simple components of a racial, religious, sexual or national class."

By contrast, the City's subcontracting outreach program is part of a nonexhaustive list of factors subject to discretionary consideration by the City's purchasing agent, and the City's

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[15] App. 25-26.

[16] *Parents Involved in Community Schools v. Seattle School District No. 1*, 127 S. Ct. 2738 (June 28, 2007).

[17] *Id.* (emphasis added).

"lowest and best bid" procurement decisions are not based solely on compliance with the subcontracting outreach program. This Court even acknowledged in *Parents Involved in Community Schools* that setting measurable objectives to track the achievement of students from major racial and ethnic groups was very different than the invalidated racial classification in the case and had "nothing to do with the pertinent issues...."[18]

Justice Kennedy's concurring opinion in *Parents Involved in Community Schools* also indicated that certain tracking requirements by race "do not lead to different treatment based on a classification that tells each student he or she is to be defined by race, so it is unlikely any of them would demand strict scrutiny to be found permissible."[19] Justice Kennedy emphasized: "Executive and legislative branches . . . should be permitted to employ [certain race conscious policies and procedures] ... with candor and with confidence that a constitutional violation does not occur whenever a decisionmaker considers the impact a given approach might have on students of different races."[20]

The lower courts in the case at bar erroneously treated the City's discretionary "lowest and best bid" procurement criteria as a mandatory "racial classification" and erroneously subjected the "lowest and best bid" procurement criteria to strict scrutiny. Unlike the school districts' categorical and oversimplistic racial classifications in *Parents Involved in Community Schools*, the City's nonexhaustive discretionary criteria do not mandate a procurement decision based solely on

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[18] *Id.*

[19] *Id.* at p. 2792.

[20] *Id.*

race. Rather, the City's procurement agent *may* consider, as one nonexhaustive factor, a bidder's compliance with the subcontracting outreach program.

Municipalities are generally vested with broad discretion in matters related to the awarding of a public contract, and disappointed bidders do not have a protected property interest in the award of a lowest and best bid public contract.[21] The City's subcontracting outreach program, as identified in Cincinnati Municipal Code §321-37(c) and enjoined by the lower courts, is part of a nonexhaustive list of factors that *may* be used to determine the lowest and best bid. The City's procurement code does not solely consider a bidder's compliance with the subcontracting outreach program when determining the lowest and best bid, nor does it even require that the City purchasing agent examine the bidder's compliance with the subcontracting outreach program in every case. The City's procurement code therefore does not mandate a particular decision on the part of the City when determining the lowest and best bid. As a consequence, the City's procurement code does not fall within the meaning of the equal protection rule established in *Parents Involved in Community Schools* and the lower courts erred by applying strict scrutiny to the code.

This Court should grant this petition for writ of certiorari to establish the line between government programs promoting equal opportunity that are *not* subject to strict scrutiny and those mandatory racial or gender classifications that *are* subject

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[21] The lower courts ruled that Cleveland Construction had a legitimate claim of entitlement to the Convention Center drywall contract. The Supreme Court of Ohio accepted jurisdiction over the City's appeal and that matter is pending. *City of Cincinnati v. Cleveland Construction, Inc.*, Supreme Court of Ohio, Case No. 07-0114.

to strict or other heightened scrutiny. Alternatively, the Court should grant the petition and remand for further consideration in light of the Court's recent decision in *Parents Involved in Community Schools v. Seattle School District No. 1*.

II. The Strict Scrutiny Rule of *Adarand Constructors v. Pena* and the Federal Circuit Cases Cited Below Does Not Apply to a Discretionary, Non-Mandatory Municipal Outreach/Tracking Program Designed to Promote Equal Opportunities for Minority-Owned and Women-Owned Businesses.

The City's subcontracting outreach program promotes fair opportunities for minority-owned and women-owned businesses to participate in government contracts to the extent of their availability. It strikes a legal balance between the ability to monitor the participation of minority-owned and women-owned businesses in City contracts and the imposition of race and gender-based mandates. The program does not create quotas or set-asides. It does not mandate that the City's purchasing agent select a bidder for a government contract based upon compliance with the program. The lower courts erred by applying strict or other heightened scrutiny to the City's subcontracting outreach program. As described below, the federal courts have applied strict scrutiny when a racial classification serves as an incentive, a pressure, or an obligation to favor one group over another. Some federal courts have recognized, however, that an outreach program may not be subject to strict scrutiny as a racial or gender classification, a distinction that the Ohio First District Court of Appeals failed to recognize in the case at bar.

The Ohio First District Court of Appeals overbroadly relied upon *Adarand Constructors v. Pena*[22] for its conclusion that the City's subcontracting outreach program was subject to strict scrutiny.[23] *Adarand*, like *Parents Involved in Community Schools*, *supra*, considered "racial classifications" that mandated different treatment of individuals based solely on race. In *Adarand*, the challenged regulations provided a financial incentive to bidding contractors to grant a preference to minority subcontractors. The City's subcontracting outreach program, by contrast, does not grant a financial incentive to bidding contractors, yet the Ohio First District Court of Appeals failed to recognize this important distinction.

For further support of its erroneous conclusion that the City's program was subject to strict judicial scrutiny,[24] the Ohio First District Court of Appeals cited the inapposite *Lutheran Church-Missouri Synod v. FCC*,[25] *Bras v. California Pub. Utils. Comm.*,[26] *Monterey Mechanical Co. v. Wilson*,[27] and *Safeco Ins. Co. of America v. White House*.[28]

In *Lutheran Church-Missouri Synod*, the District of Columbia Circuit Court held that the Federal Communication

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[22] 515 U.S. 200 (1995).

[23] App. 24.

[24] App. 24-25, n. 20.

[25] 141 F.3d 344 (C.A.D.C. 1998), *petition for rehearing en banc denied*,154 F.3d 487 (C.A.D.C. 1998).

[26] 59 F.3d 869 (9th Cir. 1995).

[27] 125 F.3d 702 (9th Cir. 1997).

[28] 191 F.3d 675 (6th Cir. 1999).

Commission's equal employment opportunity regulations were subject to review under the strict scrutiny standard. The Court's reasoning was that the FCC regulations "*oblige* stations to grant some degree of preference to minorities in hiring" by attaining, or approximating, "proportional representation" mirroring "the racial breakdown of their 'metropolitan statistical area.'"[29] The Court characterized the regulations as a "screening device" that created "a strong incentive to meet the numerical goals."[30] The D.C. Circuit emphasized: "Further, and most significant in a station's calculus, the Commission itself has given every indication that the employment profile is a serious matter."[31] The Court added that a government hiring program that "*can and surely will* result in individuals being granted a preference because of their race" constituted governmental action that should be subject to strict scrutiny.[32]

When denying the FCC's petition for rehearing, a majority of the D.C. Circuit reiterated the conclusion that "it is clear that these regulations *do* effectively oblige the Church to implement racial preferences in its hiring decisions" and they "indisputably pressure" race-based hiring decisions.[33] The majority suggested that a regulation that merely "authorizes" a racial preference might not become a racial classification

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[29] 141 F.3d at 351-52 (emphasis added).

[30] *Id.* at p. 353.

[31] *Id.*

[32] *Id.* at p.354 (emphasis added).

[33] 154 F.3d at 491.

subject to strict scrutiny.[34] Nevertheless, those judges concluded that the FCC regulations "unquestionably 'encourage'" racial preferences."[35] They bluntly held that "it is the fact of encouragement ... that makes this regulation a racial classification."[36] The dissenting judges concluded that the regulations did not require or oblige the exercise of racial preferences and therefore were not subject to strict scrutiny.[37]

The D.C. Circuit Court majority's clear emphasis on the role of "encouragement" in determining what constitutes a racial classification subject to strict scrutiny presages the City's challenged subcontracting outreach program and demonstrates the plain error of the Ohio First District Court of Appeals' oversimplistic conclusion that the City's subcontracting outreach program was subject to strict scrutiny: "That does not mean that any regulation encouraging broad outreach to, as opposed to the actual hiring of, a particular race would necessarily trigger strict scrutiny. *Whether the government can encourage—or even require—an outreach program specifically targeted on minorities is, of course, a question we need not decide.*"[38] The majority held that not "all race conscious measures adopted by the government must be subjected to strict scrutiny."[39]

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[34] *Id.* at n. 5.

[35] *Id.*

[36] *Id.* at p. 492.

[37] *Id.* at pp. 491-92.

[38] *Id.* at p. 492 (emphasis added).

[39] *Id.*

The City's subcontracting outreach program, in contrast to the FCC regulations at issue in *Lutheran Church-Missouri Synod*, does not encourage the hiring of any particular race, which was the essential concern that dictated the D.C. Circuit's conclusion that the FCC regulations were subject to strict scrutiny: "*The imposition of numerical norms based on proportional representation*—which is the core element to what are often referred to as affirmative action, set aside, or quota programs—is the aspect of the Commission's rule that makes it impossible for us to apply any standard of review other than strict scrutiny."[40] The City's subcontracting outreach program does not "impose numerical norms based on proportional representation" and it does not "treat people differently according to [their particular] race."[41] In fact, the D.C. Circuit even suggested that requiring employers to examine the racial composition of their workforces (like the City's program) may be an anti-discrimination enforcement technique that does not implicate racial preferences.[42]

Finally, the majority on the D.C. Circuit emphasized the different relevance of improperly comparing, on the one hand, the proportionality of minorities in the employer's workforce to the proportionality of minorities in the *overall population* and, on the other, comparing the racial composition of those holding at issue jobs to the racial composition of qualified persons in the *labor market*. The former is not "the relevant statistical gauge."[43] The City's subcontracting outreach program, in contrast, focuses on the latter relevant gauge by

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[40] *Id.* (emphasis added).

[41] *Id.*

[42] *Id.* at n. 7.

[43] *Id.* at pp. 493-94.

generally comparing the subcontractors proposed by a bidder with all the qualified minority-owned owned and women-owned subcontractors in the specific labor market.

The Ohio First District Court of Appeals also cited a Ninth Circuit decision, *Monterey Mechanical Co. v. Wilson, et al.*[44] The California statute reviewed by the Ninth Circuit required general contractors to subcontract percentages of work to minority, women, and disabled veteran owned subcontractors, or demonstrate good faith efforts to do so. This was a *mandatory* obligation and the statute required that a contractor's bid be disqualified for noncompliance. The statute *barred* a contract award to a bidder that did not comply with either the percentage goals or the good faith efforts. Relying on its earlier decision in *Bras v. California Public Utilities Commission*,[45] the Ninth Circuit concluded that the mandatory California statute was subject to strict scrutiny.[46]

Bras analyzed a statutory scheme for increasing women, minority, and disabled veteran business enterprise procurement that, according to the majority of the panel, authorized the use of set-asides.[47] The Public Utilities Commission was empowered to sanction utility companies for failing to make acceptable progress.[48] The dissent, by contrast, disagreed and characterized as "specious" the conclusion that set-asides were

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[44] 125 F.3d 702 (9th Cir.1997); App. 24, n. 20.

[45] 59 F.3d 869 (9th Cir. 1995) (also cited by the Ohio First District Court of Appeals; App. 24, n. 19).

[46] 125 F.3d at 711-712.

[47] 59 F.3d at 874.

[48] *Id.* at p. 872.

authorized.[49] The City's subcontracting outreach program does not authorize the use of set-asides and does not empower City officials to sanction bidders for City contracts within the meaning of *Bras*, nor does the City's subcontracting outreach program automatically bar the City's purchasing agent from awarding a contract to a bidder that does not meet certain percentage goals.

The Ohio First District Court of Appeals also relied upon the inapposite Sixth Circuit decision in *Safeco Ins. Co. of America v. City of White House, Tennessee*[50] to justify its conclusion that the City's subcontracting outreach program was subject to strict scrutiny. In *Safeco*, the Sixth Circuit evaluated USEPA requirements regarding subcontracting with minority-owned and women-owned businesses. The Sixth Circuit explained that the EPA regulation "anticipates the formulation of numerical objectives (through recipients' 'fair share objectives'), or at least the creation of subcontracting 'goals.'"[51] The Sixth Circuit further concluded that the EPA interpreted its regulation in a manner "requiring an outcome resulting in the hiring of an MBE subcontractor."[52] The Sixth Circuit indicated that strict judicial scrutiny applies only where "outreach" "'indisputably pressures' contractors to hire minority subcontractors."[53] The Sixth Circuit discussed "onerous burden[s]" and elements like "[d]ocumentation requirements and the geographic scope of solicitation" that had

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[49] *Id.* at p. 878.

[50] 191 F.3d 675 (6th Cir. 1999); App. 24, n. 6.

[51] *Id.* at p. 690.

[52] *Id.* at p. 691.

[53] *Id.* at p. 692.

to be considered to determine whether there was indisputable pressure on contractors to hire minority-owned subcontractors.[54]

In *Safeco*, the Sixth Circuit surveyed the conflicting rulings by other circuit courts and stated: "Outreach efforts may or may not require strict scrutiny."[55] The application of strict scrutiny turned on whether the government program was, in reality, a "racial classification" that mandated the hiring of minority-owned firms. If the required outreach does not mandate the government hiring of minority-owned firms then strict scrutiny does not apply.

Similarly, the D.C. Circuit in *Lutheran Church-Missouri Synod*, *supra*, distinguished outreach from actual hiring and expressly did not reach the question "[w]hether the government can encourage—or even require—an outreach program specifically targeted on minorities."[56] In *Safeco*, the Sixth Circuit indicated that the Second Circuit distinguished unobjectionable solicitation efforts from improper "set-asides,"[57] and that the Eleventh Circuit ruled that "strict scrutiny is generally inapplicable" to outreach efforts that target one race.[58]

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[54] *Id.* at p. 691.

[55] *Id.* at p. 692.

[56] 154 F.3d at 492.

[57] 191 F.3d at 690 (discussing *Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo*, 981 F.2d 50, 60 (2d Cir. 1992)).

[58] *Id.* at p. 692 (quoting *Allen v. Alabama State Bd. of Educ.*, 164 F.3d 1347, 1352 (11th Cir. 1999)).

Since the landmark holding in *Adarand*, the jurisprudence of "racial classifications" has developed nuances. Although *Adarand* provides that "racial classifications" must be subject to strict scrutiny, at least two federal courts of appeals have extended the *Adarand* analysis by recognizing the distinction between "racial classifications" that result in "indisputable pressure" and outreach programs that promote equal opportunities for minorities and women. The D.C. Circuit in *Lutheran Church-Missouri Synod* and the Sixth Circuit in *Safeco* both distinguished outreach programs from those "racial classifications" that "indisputably pressure" contractors to favor certain subcontractors over others based solely on race. Each court of appeals acknowledged that an outreach program is not automatically a "racial classification" subject to strict scrutiny.

In relying on *Safeco* to support its holding in the case at bar, the Ohio First District Court of Appeals overbroadly applied strict and other heightened scrutiny to the City's subcontracting outreach program because the City's program does not mandate the hiring of minority-owned or women-owned firms. The City's subcontracting outreach program, in contrast to the program scrutinized in *Safeco*, did not require an outcome resulting in the hiring of minority or women-owned subcontractors. It did not impose "indisputable pressure" on bidders to utilize minority or women-owned subcontractors. Moreover, under the Cincinnati Municipal Code, application of the program to a particular "lowest and best bid" procurement was facially discretionary.

The City's program is not a racial classification, it is not an improper "set-aside," and it does not mandate an outcome resulting in the hiring of minority-owned or women-owned firms. Strict scrutiny does not apply. The Ohio First District Court of Appeals' overbroad invalidation of legitimate outreach efforts subjects public entities to unwarranted equal protection

lawsuits and, in the case at bar, erroneously enjoined the City's program.

CONCLUSION

The City's permissive "lowest and best" consideration of public contract bidders' efforts to use minority-owned and women-owned subcontractors to the extent of their availability is not mandatory, is not the sole criteria for the municipality's procurement decision, is not a "racial classification" or a "gender classification," and does not "indisputably pressure" bidders to utilize minority-owned and women-owned subcontractors. The lower courts erred by applying strict and other heightened scrutiny to the City's subcontracting outreach.

This Court should grant this petition for writ of certiorari to reverse the rulings of the lower courts and to clearly establish that the City's outreach effort to achieve equality of *opportunity* for municipal contracts is not subject to strict or other heightened judicial scrutiny. This Court and some federal circuit courts have indicated that tracking efforts, like the City's subcontracting outreach program, are not subject to strict or other heightened scrutiny. Alternatively, the Court should grant the petition and remand for further consideration in light of the decision in *Parents Involved in Community Schools v. Seattle School District No. 1*.

Respectfully submitted,

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APPENDIX A

SUPREME COURT OF OHIO

2007-0114

[Filed May 2, 2007]

Cleveland Construction, Inc. Appellant/Cross-Appellee,	)
v.	)
City of Cincinnati, et al Appellees/Cross-Appellants.	)

Hamilton App. Nos. C-050749, C-050779, and C-050888, 2006 Ohio 6452, 864 N.E.2d 116. *Cleveland Constr., Inc. v. City of Cincinnati*, 2006 Ohio 6452, 864 N.E.2d 116, 2006 Ohio App. LEXIS 6410 (Ohio Ct. App., Hamilton County, 2006)

JUDGES: O'Donnell, J., would accept the appeal. Lanzinger, J., would accept the appeal. Pfeifer and Cupp, JJ., dissent.

OPINION:

APPEAL ACCEPTED FOR REVIEW

Discretionary appeal accepted on Proposition of Law Nos. I and III.

O'Donnell, J., would accept the appeal on Proposition of Law No. I only. Lanzinger, J., would accept the appeal on Proposition of Law No. III only. Pfeifer and Cupp, JJ., dissent.

APPENDIX B

IN THE SUPREME COURT OF OHIO

CASE NO. 07-0114

APPEAL NO. C050749, APPEAL NO. C050779
APPEAL NO. C050888
(Consolidated)

[Filed January 22, 2007]

CITY OF CINCINNATI	)
Defendant-Appellant	)
	)
v.	)
	)
CLEVELAND CONSTRUCTION, INC.	)
Plaintiff-Appellee	)
	)

COURT OF APPEALS
FIRST APPELLATE DISTRICT
CASE NO. A-0402638

MEMORANDUM IN SUPPORT OF JURISDICTION OF
DEFENDANT-APPELLANT CITY OF CINCINNATI

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* * * * *

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APPENDIX C

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

APPEAL NO. C-050749, C-050779, C-050888

[Filed January 18, 2007]

CLEVELAND CONSTRUCTION, INC.
Appellant/Cross-Appellee,

vs.

CITY OF CINCINNATI, et al.
Appellees/Cross-Appellants.

ENTRY GRANTING MOTION TO STRIKE APPLICATION FOR RECONSIDERATION

This cause came on to be considered upon the application of the appellees/cross-appellants for reconsideration, the motion of the appellant/cross-appellee to strike the application as untimely filed, and the response of appellees/cross-appellants to the motion to strike.

The Court finds that the motion to strike the application for reconsideration is well taken and is hereby granted.

To The Clerk:

Enter Upon the Journal of the Court on Jan 18 2007 per order of the Court.

By: /s/_____ (Copies sent to all counsel)
Acting Presiding Judge

APPENDIX D

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

APPEAL NOS. C-050749, C-050779, C-050888
TRIAL NO. A-0402638

[Filed December 8, 2006]

CLEVELAND CONSTRUCTION, INC.,
Plaintiff-Appellant/
Cross-Appellee,

vs.

CITY OF CINCINNATI,
Defendant-Appellee/
Cross-Appellant,

and

TIMOTHY RIORDAN,

BERNADINE FRANKLIN,

NATE MULLANEY

ALICIA TOWNSEND,

KATHI RANFORD,

and)
)
VALLEY INTERIOR SYSTEMS, INC.,)
Defendants-Appellees.)

JUDGMENT ENTRY

This cause was heard upon the appeal, the record, the briefs, and arguments.

The judgment of the trial court is affirmed in part, reversed in part, and cause remanded for the reasons set forth in the Opinion filed this date.

Further, the court holds that there were reasonable grounds for this appeal, allows no penalty and orders that costs are taxed under App. R. 24.

The court further orders that 1) a copy of this Judgment with a copy of the Opinion attached constitutes the mandate, and a) the mandate be sent to the trial court for execution under App. R. 27.

To The Clerk:

Enter upon the Journal of the Court on December 8, 2006 per Order of the Court.

By: /s/Hildebrandt
Presiding Judge

APPENDIX E

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

APPEAL NOS. C-050749, C-050779, C-050888
TRIAL NO. A-0402638

[Filed December 8, 2006]

CLEVELAND CONSTRUCTION, INC.,
Plaintiff-Appellant/
Cross-Appellee,

vs.

CITY OF CINCINNATI,
Defendant-Appellee/
Cross-Appellant,

and

TIMOTHY RIORDAN,

BERNADINE FRANKLIN,

NATE MULLANEY,

ALICIA TOWNSEND,

KATHI RANFORD,)
)
and)
)
VALLEY INTERIOR SYSTEMS, INC.,)
Defendants-Appellees.)
)

Civil Appeals From: Hamilton County Court of Common Pleas.

Judgment Appealed From Is: Affirmed in Part, Reversed in Part, and Cause Remanded.

Date of Judgment Entry on Appeal: December 8, 2006

SYLVIA SIEVE HENDON, Judge.

OPINION

{¶1} This case arose from the city of Cincinnati's rejection of a bid by Cleveland Construction Co. for drywall work on the expansion and renovation of the Cincinnati Convention Center. At the heart of the dispute was the city's implementation of its small business enterprise (SBE) program.

{¶2} Cincinnati Municipal Code (CMC) 321-37 required the city to award a construction contract to the lowest and best bidder. The ordinance set forth a non-exhaustive list of factors that the city purchasing agent could consider in determining the lowest and best bid. One of the factors that could be considered was a contractor's compliance with the rules and

regulations of the city's SBE Subcontracting Outreach Program.[1]

{¶3} Where a lowest-and-best determination was based primarily on the contractor's subcontracting-outreach compliance, the ordinance had a built-in cap. The contract award could be made, "subject to the following limitation: the bid could not exceed an otherwise qualified bid by ten (10%) percent or Fifty Thousand Dollars ($50,000.00), whichever is lower."[2] The cap was apparently intended to strike a balance between the city's efforts to include small businesses in public contracts and the city's interest in protecting its taxpayers from excessive costs.

{¶4} On December 23, 2003, the city issued an invitation to bid on the Cincinnati Convention Center Expansion and Renovation Project, entitled "Bid Package C/TC-09A Drywall." The city required bidders to show that they had made a good-faith effort to obtain the participation of SBEs on the project. For the drywall-contract bids, the city established a mandatory SBE-participation goal of 35%. Bidders were notified that their failure to meet the SBE-participation goal could cause a bid to be rejected as nonresponsive. The city received bids until February 5, 2004.

{¶5} On February 11, 2004, Kathi Ranford, a contract-compliance officer, reported to Bernadine Franklin, the city's purchasing agent, that none of the three bidders for the project's drywall contract had complied with the 35% SBE-participation requirement. According to Ranford, Cleveland

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[1] CMC 321-37(c)(4).

[2] CMC 321-37(c).

had submitted a bid with 3% SBE participation, Valley Interior Systems had submitted a bid with 34% SBE participation, and Kite, Inc., had submitted a bid with no SBE participation. In that round of bidding, Cleveland's bid had been the lowest-dollar bid.

{¶6} Because none of the bidders had achieved the full 35% SBE-participation goal, the city conducted an emergency rebidding for the drywall contract. On February 24, 2004, Ranford notified Franklin that Cleveland had submitted a re-bid for $8,889,000, with 10% SBE participation, and that Valley had submitted a re-bid for $10,135,022, with 40% SBE participation.

{¶7} The city's office of contract compliance deemed Cleveland's bid to be unacceptable due to its failure to achieve 35% SBE participation. In all other respects, however, Cleveland's bid had been found acceptable according to the city's purchasing division.

{¶8} Following a review of the acceptability of the bids, Franklin issued a recommendation to Timothy Riordan, an assistant city manager, that the drywall contract be awarded to Valley. Franklin's recommendation stated, "Pursuant to Section 321-37 of the Municipal Code, the bid submitted by [Valley] has been determined to be the lowest and best bid."

{¶9} Valley's new bid exceeded Cleveland's new bid by $1,246,022, well over the $50,000 or 10% cap in CMC 321-37. Nonetheless, on March 3, 2004, the city awarded the drywall contract to Valley and instructed Valley to commence work under the terms of the contract.

Cleveland Files Suit

{¶10} Three weeks later, on March 30, 2004, Cleveland brought an action for injunctive relief and damages against the city, several city employees, and Valley. Cleveland asked the court to restrain the city and Valley from proceeding on the drywall contract and to order the city to award the contract to Cleveland.

{¶11} In addition, Cleveland sought declarations by the court that (1) the city's award of the contract violated CMC 321-37; (2) the city's drywall contract with Valley was void; (3) the city's SBE program was unconstitutional and in violation of Section 1983, Title 42, U.S.Code; (4) the city had deprived Cleveland of a property interest; (5) Cleveland was the lowest and best bidder; and (6) the city's delegation of discretion to its purchasing agent under the SBE subcontracting-outreach program was void.

{¶12} Finally, Cleveland sought compensatory and punitive damages, as well as attorney fees and costs.

{¶13} The trial court denied Cleveland's motion for a temporary restraining order. Later, upon motion, the trial court dismissed the city employees from the action.

{¶14} In June 2005, the case proceeded to a jury trial. At the close of Cleveland's case, the trial court directed a verdict in favor of the city and Valley on Cleveland's claims for lost profits. Cleveland's remaining claims for injunctive and declaratory relief and attorney fees were tried to the bench, by agreement of the parties.

{¶15} At the conclusion of the trial, the court found that the city had violated CMC 321-37 by awarding the drywall

contract to Valley rather than to Cleveland. As a result, the court held, the city had abused its discretion in a manner that had denied Cleveland the contract in violation of its federally protected due-process rights and in violation of Section 1983.

{¶16} The court held that the city's SBE program rules and guidelines created race- and gender-based classifications that rendered the program facially unconstitutional. The court further found that the city had pressured and encouraged bidders, including Cleveland, to draw upon race- and gender-based classifications, in violation of Cleveland's rights under Section 1983. But the court held that Cleveland had failed to establish that the denial of the drywall contract was the result of the race- and gender-based classifications; rather, it held that the denial had been the result of the city's preference for small businesses.

{¶17} The court rendered a declaratory judgment that precludes the city from awarding future contracts to a bidder that exceeds the cap set forth in CMC 321-37 if the bid selection is based primarily on the bidders' compliance with the SBE subcontracting-outreach program.

{¶18} The court permanently enjoined the city from maintaining or applying race-or gender-based classifications in its SBE rules and guidelines, absent a formal determination that such race-based provisions were narrowly tailored and necessary to fulfill compelling governmental interests, or that such gender-based provisions were substantially related to genuine and important governmental objectives.

{¶19} Finally, the court entered judgment in favor of Cleveland as the prevailing party, and against the city, for Cleveland's reasonable attorney fees and costs pursuant to

Section 1988, Title 42, U.S. Code. The court also entered judgment in favor of Valley.

{¶20} On appeal, Cleveland argues that the trial court erred by (1) directing a verdict in favor of the city on Cleveland's damage claims; (2) refusing to declare Valley's drywall contract to be void or to prohibit performance under the contract; (3) ruling that Cleveland could not elicit testimony from Valley's subcontractors with respect to post-contract events; (4) denying Cleveland's motion for a new trial; (5) granting the motions to dismiss individual city employees; and (6) making findings concerning causation of damages.

{¶21} In its cross-appeal, the city argues that the trial court (1) erred by applying CMC 321-37; (2) lacked jurisdiction over Cleveland's claims for injunctive relief; (3) erred by concluding that the city had deprived Cleveland of its right to procedural due process; (4) erred by ruling that portions of the city's SBE program created constitutionally impermissible race- and gender-based classifications; and (5) erred by awarding attorney fees to Cleveland. We first address the city's assignments of error.

The Application of CMC 321-37

{¶22} In its first assignment of error, the city argues that the trial court erred by applying CMC 321-37 in its analysis of Cleveland's claims. The city contends that Franklin had not applied the provisions of CMC 321-37 in her review of bids for the project because the ordinance had not been in place at the time the project's "procurement process" was planned.

{¶23} The record reflects that CMC 321-37 had been adopted in specific contemplation of the convention center

project. By its terms, the ordinance had been enacted as an emergency measure due to the city's "immediate need to proceed with the bidding of the Convention Center and major development projects." The ordinance specifically applied to the award of construction contracts that exceeded $100,000. And the ordinance had gone into effect before the project's bid solicitation, and well before the award of the drywall contract. So Franklin's selection of the lowest and best bidder was subject to CMC 321-37.

{¶24} The city argues that "[e]ven though Valley's bid was $1.2 million more than Cleveland's, the project was well within the budget." This argument fails to take into account that "among the purposes of competitive bidding legislation are the protection of the taxpayer [and the] prevention of excessive costs."[3] The fact that the project was under budget was of questionable relevance and was certainly not dispositive of the legality of the bid-selection process.

{¶25} The city argues that even if Franklin had applied CMC 321-37 to the drywall-contract bids, the ordinance's cap would not have come into play because Cleveland's bid was not an "otherwise qualified" bid. But the city acknowledges in its brief that "[t]he trial evidence established that Cleveland lost because its drywall bid failed to reserve at least 35% of the work for small business enterprises as the bid documents required." In other words, but for its SBE noncompliance, Cleveland's bid was qualified. Where the sole reason that Cleveland's bid was rejected was its noncompliance with the SBE subcontracting-outreach program, Cleveland was an "otherwise qualified" bidder. Under these circumstances,

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[3] *Danis Clarkco Landfill Co. v. Clark Cty. Solid Waste Mgmt Dist.*, 73 Ohio St.3d 590, 602, 1995 Ohio 301, 653 N.E.2d 646.

Valley's SBE-compliant bid could not have exceeded Cleveland's bid by the $50,000 or 10% cap.

{¶26} Accordingly, we hold that the trial court properly considered and applied CMC 321-37. We overrule the city's first assignment of error.

Cleveland's Standing

{¶27} In its second assignment of error, the city argues that the trial court lacked jurisdiction over Cleveland's claims for injunctive relief. The city contends that the possibility that Cleveland might bid on a city contract in the future did not create a risk that it would again be subject to a deprivation of rights.

{¶28} In Ohio, it is well established that standing to challenge the constitutionality of a legislative enactment exists where a litigant "has suffered or is threatened with direct and concrete injury in a manner or degree different from that suffered by the public in general, that the law in question has caused the injury, and that the relief requested will redress the injury." [4]

{¶29} In the context of a constitutional challenge to a set-aside program, the "injury in fact" is the inability to compete on an equal footing in the bidding process, and not necessarily the loss of a contract. So to establish standing, a party challenging a set-aside program need only demonstrate that it

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[4] *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 469-470, 1999 Ohio 123, 715 N.E.2d 1062.

is able and ready to bid on contracts and that a discriminatory policy prevents it from doing so on an equal basis.[5]

{¶30} At trial, the city specifically stipulated that Cleveland intended and was able to bid on future city construction projects. And the city's discriminatory policies would have affected Cleveland's ability to compete fairly. So Cleveland had sufficient standing to seek injunctive relief against the city. We overrule the city's second assignment of error.

Deprivation of a Property Interest

{¶31} In its third assignment of error, the city argues that the trial court erred by concluding that the city had deprived Cleveland of a right to procedural due process.

{¶32} One of the proscriptions of the Fourteenth Amendment is the deprivation of a person's property interests without due process of law.[6] In a due-process challenge based upon such a deprivation, we must first determine whether a protected property interest was at stake.

{¶33} Property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support

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[5] *Northeastern Fla. Chapter of Associated Gen. Contractors of Am. v. Jacksonville* (1993), 508 U.S. 656, 666, 113 S. Ct. 2297, 124 L. Ed. 2d 586.

[6] *Bd. of Regents v. Roth* (1972), 408 U.S. 564, 569-570, 92 S. Ct. 2701, 33 L. Ed. 2d 548.

claims of entitlement to those benefits."[7] A person has a property interest in a benefit, such as a public contract, if the person has a legitimate claim of entitlement to it.[8] A person's unilateral expectation of a benefit is not enough.[9]

{¶34} The Sixth Circuit Court of Appeals has held that a disappointed bidder may establish a legitimate claim of entitlement to a public contract in one of two ways. A bidder can either show that it actually was awarded the contract and then deprived of it, or that the government abused its limited discretion in awarding the contract to another bidder.[10]

{¶35} Generally, municipalities are vested with broad discretion in matters related to public contracts. But that discretion is not limitless.[11] For example, a municipality "may by its actions commit itself to follow rules it has itself established."[12]

{¶36} In the context of lowest-and-best-bidder determinations, Ohio courts are reluctant to substitute their

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[7] *Id.* at 577, 92 S. Ct. 2701.

[8] *Cleveland Constr. v. Ohio Dept. of Admin. Servs., GSA* (1997), 121 Ohio App. 3d 372, 394, 700 N.E.2d 54.

[9] *Roth*, supra, at 577, 92 S. Ct. 2701.

[10] *United of Omaha Life Ins. Co. v. Solomon* (C.A.6, 1992), 960 F.2d 31, 34; *Enertech Elec. v. Mahoning County Commrs.* (C.A.6, 1996), 85 F.3d 257, 260.

[11] *Danis*, supra, at 604, 1995 Ohio 301, 653 N.E.2d 646.

[12] *Id.* at 603, 1995 Ohio 301, 653 N.E.2d 646.

judgment for that of city officials.[13] But where city officials abuse the discretion vested in them, courts will intervene.[14] An abuse of discretion "connotes more than an error of law or of judgment; it implies an unreasonable, arbitrary, or unconscionable attitude. * * * 'Arbitrary' means 'without adequate determining principle; * * * *not governed by any fixed rules or standard* .' * * * 'Unreasonable' means 'irrational.'"[15]

{¶37} In this case, the city had established a "fixed rule" with respect to the award of a contract based primarily upon the bidder's subcontracting-outreach program compliance. In that instance, CMC 321-37 required the city to apply the ordinance's cap.

{¶38} But, here, the evidence demonstrated that the city had arbitrarily ignored the cap in awarding the contract to Valley. Thus, we agree with the trial court that the city's failure to follow the directive of its own ordinance constituted an abuse of discretion that resulted in a deprivation of Cleveland's property interest in the contract award. We overrule the city's third assignment of error.

SBE Program Provisions Were Facially Unconstitutional

{¶39} In its fourth assignment of error, the city argues that the trial court erred by ruling that elements of the rules

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[13] *See Cedar Bay Constr., Inc. v. Fremont* (1990), 50 Ohio St.3d 19, 552 N.E.2d 202.

[14] *Id.* at 21-22, 552 N.E.2d 202.

[15] *Dayton, ex rel. Scandrick v. McGee* (1981), 67 Ohio St.2d 356, 359, 423 N.E.2d 1095 (emphasis added).

and guidelines in the city's SBE program created constitutionally impermissible race- and gender-based classifications. The city contends that the program was a lawful "outreach" program that encouraged contractors to use "good faith efforts" to promote opportunities for minorities and females.

{¶40} The Fourteenth Amendment requires strict scrutiny of all race-based action by state and local governments.[16] Racial classifications must serve a compelling government interest and must be narrowly tailored to further that interest.[17] Gender-based classifications, by contrast, require an "exceedingly persuasive" justification.[18]

{¶41} At trial, the city did not put forth any argument or evidence to demonstrate that its SBE program could withstand such heightened scrutiny. Instead, the city relied on its assertion that increased scrutiny should not apply in the first instance because its SBE program created neither race- nor gender-based classifications.

{¶42} On appeal, the city acknowledges that it had predetermined estimates of the availability of minorities and females for each trade represented in the convention center project. But the city argues that its availability estimates were

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[16] *Richmond v. J.A. Croson Co.* (1989), 488 U.S. 469, 109 S. Ct. 706, 102 L. Ed. 2d 854.

[17] *Adarand Constructors v. Pena* (1995), 515 U.S. 200, 235, 115 S. Ct. 2097, 132 L. Ed. 2d 158.

[18] *United States v. Virginia* (1996), 518 U.S. 515, 533, 116 S. Ct. 2264, 135 L. Ed. 2d 735.

for informational purposes only, and that bidders were required to do nothing in response.

{¶43} Racial or gender classifications may arise from a regulation's strict requirements, such as mandated quotas or set-asides. But rigid mandates are not a prerequisite to a finding of a racial classification.[19] Where regulations pressure or encourage contractors to hire minority subcontractors, courts must apply strict scrutiny.[20]

{¶44} For example, in *Adarand Constructors v. Pena*,[21] the United States Supreme Court considered federal regulations that provided financial incentives to bidding contractors to hire minority subcontractors. The regulations did not require contractors to use minority subcontractors. But contractors would receive additional compensation if they did so. The court held that, to the extent that the regulations provided incentives to contractors to use race-based classifications, the regulations were subject to strict scrutiny.[22]

{¶45} In determining whether strict scrutiny must be applied to the city's SBE program, we must look behind its ostensibly neutral labels such as "outreach program" and "participation goals." The program's rules and guidelines

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[19] *Bras v. Calif. Pub. Utils. Comm.* (C.A.9, 1995), 59 F.3d 869.

[20] *See Lutheran Church-Missouri Synod v. FCC* (C.A.D.C., 1998), 332 U.S. App. D.C. 165, 154 F.3d 487; *Monterey Mechanical Co. v. Wilson* (C.A.9, 1997), 125 F.3d 702; *Safeco Ins. Co. of America v. White House* (C.A.6, 1999), 191 F.3d 675.

[21] (1995), 515 U.S. 200, 115 S. Ct. 2097, 132 L. Ed. 2d 158.

[22] *Id.* at 224, 115 S. Ct. 2097.

"are not immunized from scrutiny because they purport to establish 'goals' rather than 'quotas.'[Courts] look to the economic realities of the program rather than the label attached to it."[23]

{¶46} Under the city's SBE rules and guidelines, all bidders were required to use "good faith efforts" to promote opportunities for minority- and women-owned businesses (MBEs and WBEs) to the extent of their availability as determined by the city. With respect to the drywall portion of the project, the city estimated that the availability of MBEs was 13.09%, and that it was 1.05% for WBEs.

{¶47} Bidders were required to provide detailed descriptions of the techniques used to obtain participation of MBEs and WBEs. The city would then evaluate each bidder's documented efforts to achieve participation of MBEs and WBEs. If that review determined that a bid's utilization percentage for MBEs and WBEs was lower than the estimated availability for those groups, the bid would be flagged for a discrimination investigation.

{¶48} Where the city's SBE program required documentation of a bidder's specific efforts to achieve the participation of minority subcontractors to the extent of their availability as predetermined by the city, the program undeniably pressured bidders to implement racial preferences.[24] Therefore, the program's rules must be subject to strict scrutiny. To the extent that the rules pressured bidders to hire women-owned subcontractors, the city was

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[23] *Bras*, supra, at 874.

[24] *Safeco Inc.*, supra, at 692, citing *Lutheran*, supra, at 491.

required to demonstrate an "exceedingly persuasive" justification for the differential treatment.

{¶49} Given that the city effectively conceded that it could not justify race- or gender-based classifications under either standard of heightened scrutiny, the trial court properly determined that those elements of the program that caused bidders to use racial- or gender-based preferences were unconstitutionally impermissible.

Award of Attorney Fees

{¶50} In its fifth assignment of error, the city argues that the trial court erred by awarding attorney fees to Cleveland. The city contends that Cleveland was not entitled to the award because it was not a prevailing party.

{¶51} A "prevailing party" is one who "succeed[s] on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit."[25] To be a "prevailing party," there must have been "a court-ordered 'change [in] the legal relationship'" between the parties.[26] In this regard, a declaratory judgment may serve as the basis for an award of attorney fees.[27]

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[25] *Hensley v. Eckerhart* (1983), 461 U.S. 424, 433, 103 S. Ct. 1933, 76 L. Ed. 2d 40.

[26] *Buckhannon Bd. v. W. Va. Dept. of Health & Human Res.* (2001), 532 U.S. 598, 604, 121 S. Ct. 1835, 149 L. Ed. 2d 855.

[27] *Hewitt v. Helms* (1987), 482 U.S. 755, 761, 107 S. Ct. 2672, 96 L. Ed. 2d 654.

{¶52} But the entry of a declaratory judgment in a party's favor does not automatically render that party a prevailing party under Section 1988.[28] "In all civil litigation, the judicial decree is not the end but the means. At the end of the rainbow lies not a judgment, but some action (or cessation of action) by the defendant that the judgment produces-the payment of damages, or some specific performance, or the termination of some conduct. Redress is sought *through* the court, but *from* the defendant. This is no less true of a declaratory judgment suit than of any other action. The real value of the judicial pronouncement - what makes it a proper judicial resolution of a 'case or controversy' rather than an advisory opinion - is in the settling of some dispute *which affects the behavior of the defendant towards the plaintiff* ." (Emphasis in original.)[29]

{¶53} We hold that the trial court did not abuse its discretion in ordering attorney fees. Cleveland successfully challenged the unconstitutional race- and gender-based provisions of the city's SBE program. As a result, the city will no longer be permitted to apply those provisions against Cleveland or other bidders on city contracts. In that regard, Cleveland was a prevailing party because the judgment had a distinct effect on the city's behavior. Accordingly, we overrule the city's fifth assignment of error.

Directed Verdict

{¶54} In its complaint, Cleveland sought damages for the loss of profits that it would have realized had it been awarded

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[28] *Rhodes v. Stewart* (1988), 488 U.S. 1, 109 S. Ct. 202, 102 L. Ed. 2d 1.

[29] *Hewitt*, supra, at 761, 107 S. Ct. 2672.

the drywall contract. Cleveland now argues in its first assignment of error that the trial court erred by directing a verdict in favor of the city on its lost-profits claim.

{¶55} In considering a motion for a directed verdict, a trial court must construe the evidence most strongly in favor of the party against whom the motion is made.[30] In doing so, if the court "finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party, the court shall sustain the motion and direct a verdict for the moving party as to that issue."[31]

{¶56} "A motion for directed verdict * * * does not present factual issues, but a question of law, even though in deciding such a motion, it is necessary to review and consider the evidence."[32] Because a question of law is presented, we apply a de novo standard of review to a directed verdict.[33]

{¶57} Cleveland acknowledges that the Ohio Supreme Court's recent decision in *Fairlawn v. Cementech*[34] resolves

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[30] Civ.R. 50(A)(4).

[31] Civ.R. 50(A)(4).

[32] *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 95 Ohio St.3d 512, 2002 Ohio 2842, 769 N.E.2d 835, ¶4, quoting *O'Day v. Webb* (1972), 29 Ohio St.2d 215, 280 N.E.2d 896, paragraph three of the syllabus.

[33] *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.*, 76 Ohio St.3d 521, 523, 1996 Ohio 298, 668 N.E.2d 889.

[34] 109 Ohio St.3d 475, 2006 Ohio 2991, 849 N.E.2d 24.

its claim for damages under state law. In *Cementech*, the court held that when a municipality violates competitive-bidding laws in awarding a competitively bid project, a disappointed bidder cannot recover its lost profits as damages.

{¶58} But in addition to its claim for damages under state law, Cleveland sought damages under federal law, Section 1983, Title 42, U.S.Code, for the city's deprivation of its property interest in the drywall contract. Under Section 1983, a party who has been deprived of a federal right under the color of state law may seek relief through "an action at law, suit in equity, or other proper proceeding for redress."

{¶59} The basic purpose of a Section 1983 damage award is to compensate persons for injuries caused by the deprivation of constitutional rights.[35] For this reason, no compensatory damages may be awarded in a Section 1983 suit without proof of actual injury.[36] The level of a person's compensatory damages under Section 1983 is ordinarily determined according to principles derived from the common law of torts.[37]

{¶60} In *Adarand Constructors v. Pena*,[38] the United States Supreme Court considered whether a rejected bidder had standing to seek injunctive relief against future application

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[35] *Carey v. Piphus* (1978), 435 U.S. 247, 253-254, 98 S. Ct. 1042, 55 L. Ed. 2d 252.

[36] *Memphis Community Sch. Dist. v. Stachura* (1986), 477 U.S. 299, 306, 106 S. Ct. 2537, 91 L. Ed. 2d 249.

[37] *Id.* at 306-307, 106 S. Ct. 2537.

[38] (1995), 515 U.S. 200, 115 S. Ct. 2097, 132 L. Ed. 2d 158.

of a minority set-aside program. In doing so, the Court presumed that the rejected bidder was entitled to seek damages for the lost contract:

{¶61} "Adarand, in addition to its general prayer for 'such other and further relief as to the Court seems just and equitable,' specifically seeks declaratory and injunctive relief against any *future* use of subcontractor compensation classes. * * * Before reaching the merits of Adarand's challenge, we must consider whether Adarand has standing to seek forward-looking relief. Adarand's allegation that it has lost a contract in the past because of a subcontractor compensation clause *of course entitles it to seek damages for the loss of that contract* [.]" (Emphasis added.)

{¶62} Those damages may include a disappointed bidder's lost profits.[39] In *W.H. Scott Constr. Co., Inc. v. Jackson,*[40] the Fifth Circuit Court of Appeals considered an equal-protection challenge to a policy encouraging minority participation in city construction projects. The court upheld an award of lost profits to a rejected bidder who had sought damages from the city under Section 1983.

{¶63} Similarly, in *Hershell Gill Consulting Engineers, Inc. v. Miami-Dade Cty.*, Fla.,[41] the court held that a county was liable to the plaintiffs under Section 1983 for any compensatory damages resulting from its unconstitutional affirmative-action programs. The court held that the plaintiffs'

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[39] *See Flores v. Pierce* (C.A.9, 1980), 617 F.2d 1386, 1392; *Chalmers v. Los Angeles* (C.A.9, 1985), 762 F.2d 753.

[40] (C.A.5, 1999), 199 F.3d 206.

[41] (S.D.Fla.2004), 333 F. Supp. 2d 1305.

damages could include their lost profits, but that the plaintiffs in that case had failed to prove that any actual losses had resulted from the unconstitutional programs.[42]

{¶64} In this case, the trial court concluded that Cleveland's failure to adduce evidence concerning the degree of completion of the drywall contract precluded Cleveland from proceeding on its claim for money damages. The court reasoned that Cleveland's damages were speculative, not due to a failure of proof as to Cleveland's anticipated profits, but due to the court's misapprehension that Cleveland's damage claim was wholly dependent on its claim for injunctive relief.

{¶65} Certainly, the status of the drywall project would have been relevant to a determination of any injunctive relief the court may have awarded, but that evidence was not critical to Cleveland's claim for Section 1983 damages. In effect, the trial court's entry of a directed verdict on the damage claim precluded Cleveland from seeking redress, even though Cleveland could have waited to file suit until the drywall contract had been completed. The issuance of a directed verdict on the issue of Section 1983 damages before the contract's completion had the absurd result of denying redress because of Cleveland's diligence in asserting its claims.

{¶66} We recognize that a plaintiff seeking redress under Section 1983 is required to mitigate its damages.[43] But once the plaintiff has presented evidence of damages, the defendant has the burden of establishing the plaintiff's failure

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[42] *Id.* at 1339.

[43] *Meyers v. Cincinnati* (C.A.6, 1994), 14 F.3d 1115, 1119.

to properly mitigate damages.[44] So once Cleveland presented evidence of damages, the burden of proof on the issue of mitigation was on the city.

{¶67} Because a jury could have concluded that Cleveland had established all the elements of its Section 1983 claim for damages, we hold that a directed verdict in favor of the city was unwarranted. Consequently, we sustain Cleveland's first assignment of error in part, reverse the entry of the directed verdict on the Section 1983 damage claim, and remand the case for a new trial on the issues of liability and damages with respect to Cleveland's lost-profits claim under Section 1983.

{¶68} Because Cleveland's fourth and sixth assignments of error relate to the trial court's dismissal of its damage claims, we address the assignments out of order. Cleveland argues that the trial court erred by denying its motion for a new trial, given the court's erroneous dismissal of its damage claim under Section 1983. Cleveland also contends that the trial court erred by making "a finding that, essentially, amount[ed] to a directed verdict on the issue of proximate causation of Cleveland's damages in addition to that given at trial." For the reasons set forth in our disposition of Cleveland's first assignment of error, we sustain the fourth and sixth assignments of error.

The Denial of Injunctive Relief

{¶69} In its second assignment of error, Cleveland argues that the trial court erred by refusing to declare the drywall

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[44] *Id.*, citing *Rasimas v. Michigan Dept. of Mental Health* (C.A.6, 1983), 714 F.2d 614.

contract unenforceable and by failing to enjoin performance of the contract. Cleveland contends that the trial court should have enjoined performance of the contract despite the fact that substantial work had been completed on the project.

{¶70} An appellate court need not consider an issue where the court becomes aware of an intervening event that has rendered the issue moot.[45] The duty of an appellate court is to decide actual controversies between parties and to render judgments that may be carried into effect.[46] "Thus, when circumstances prevent an appellate court from granting relief in a case, the mootness doctrine precludes consideration of those issues."[47] For example, in the context of appeals involving construction projects, Ohio courts have held that an appeal is rendered moot where the appellant fails to obtain a stay of execution of the trial court's judgment and construction commences.[48]

{¶71} In this case, there is no dispute that the convention center project, which was substantially completed at the time

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[45] *Cincinnati Gas & Elec. Co. v. PUC of Ohio*, 103 Ohio St.3d 398, 2004 Ohio 5466, 816 N.E.2d 238, at ¶15, citing *Miner v. Witt* (1910), 82 Ohio St. 237, 238, 92 N.E. 21, 8 Ohio L. Rep. 71.

[46] *Miner*, supra, at 238, 92 N.E. 21.

[47] *Schwab v. Lattimore*, 166 Ohio App. 3d 12, 2006 Ohio 1372, 848 N.E.2d 912, at ¶10.

[48] *Schuster v. Avon Lake*, 9th Dist. No. 03CA008271, 2003 Ohio 6587, at ¶3; *Pinkney v. Southwick Invs., L.L.C.*, 8th Dist. Nos. 85074 and 85075, 2005 Ohio 4167; *Bd. of Commrs. v. Saunders*, 2nd Dist. No. 18592, 2001 Ohio 1710; *Smola v. Legeza*, 11th Dist. No. 2004-A-0038, 2005 Ohio 7059; *Redmon v. City Council*, 10th Dist. No. 05AP-466, 2006 Ohio 2199.

that the trial court denied the injunction, is now completed in its entirety. At no point in the proceedings did Cleveland obtain a stay of the trial court's denial of its request for a temporary restraining order. In fact, as the trial court pointed out, Cleveland did not pursue preliminary injunctive relief for an entire year. Instead, Cleveland acceded to several continuances. In denying Cleveland's motion for a preliminary injunction, the trial court noted the following:

{¶72} "The court at this time will deny Cleveland's motion for injunctive relief pending trial. The parties' desires with regard to the scheduling of this case have been solicited on a regular basis. After the action was removed to and returned from federal court, Cleveland opted not to seek a prompt hearing on [a] preliminary injunction, but sought rather to engage in the extended discovery reflected in the voluminous materials relating to the summary judgment motions. Cleveland then waited to the final day of the dispositive motion period - almost one year after the action was filed and roughly three months prior to the scheduled June 20, 2005 trial date - to pursue its preliminary injunction request."

{¶73} At this point, we can not render a judgment that could be carried into effect with respect to the performance of the drywall contract. Even if we concluded (which we expressly do not) that the trial court had erred in failing to enjoin the contract's performance, our opinion would only be advisory in nature. Consequently, we decline to address the assignment of error on its merits.

Evidentiary Rulings

{¶74} In its third assignment of error, Cleveland argues that the trial court erred by ruling that it could not elicit

testimony from Valley's subcontractors about events that had occurred after the city had awarded the contract to Valley. In support of its argument, Cleveland directs us to its examination of one of Valley's subcontractors, Marti Stouffer-Heis, owner of MS Construction Consultants.

{¶75} "Relevant evidence" is defined by Evid.R. 401 as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evid.R. 402 provides that relevant evidence is admissible, subject to enumerated exceptions, and that evidence that is not relevant is not admissible. Although the terms of Evid.R. 402 are mandatory, a trial court is vested with broad discretion in determining whether evidence is relevant.[49] A reviewing court is, therefore, limited to a determination of whether the trial court abused its discretion in admitting or excluding the disputed evidence.[50]

{¶76} Cleveland's attorney attempted to elicit testimony from Stouffer-Heis about the city's post-award enforcement of its SBE program. Counsel asked whether Stouffer-Heis had been able to perform her described "[l]ogistics, project coordination" tasks at the construction site, and whether the city had performed any investigation upon submission of her request to be certified as an SBE supplier.

{¶77} The trial court indicated that it would allow testimony by a subcontractor with respect to the current status

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[49] *See Cincinnati v. Banks* (2001), 143 Ohio App. 3d 272, 287, 757 N.E.2d 1205; *Siuda v. Howard*, 1st Dist. Nos. C-000656 and C-000687, 2002 Ohio 2292, ¶25.

[50] *See Banks*, supra.

of the uncompleted project. And the court expressly permitted counsel to question Stouffer-Heis about whether she had been certified as an SBE supplier prior to the contract award. But the court instructed counsel to otherwise restrict his questioning to matters that had occurred prior to the contract award to Valley, because Cleveland's complaint had been predicated on the rejection of its bid.

{¶78} We find no abuse of discretion by the trial court in ruling that testimony related to post-award program enforcement was irrelevant and inadmissible. We overrule Cleveland's third assignment of error.

Dismissal of City Employees

{¶79} In its fifth assignment of error, Cleveland argues that the trial court erred when it granted the individual defendants' motion to dismiss. The trial court dismissed Cleveland's claims against city employees Riordan, Franklin, Mullaney, Townsend, and Ranford in their "personal and individual capacities," on the basis of qualified immunity. Cleveland had also sued the employees in their "official capacities." Because the trial court did not explicitly dismiss the claims against the employees in their official capacities, we treat the official-capacity claims as claims against the city.[51]

{¶80} The doctrine of qualified immunity generally shields public officials performing discretionary functions from liability for civil damages to the extent that their conduct

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[51] *See Asher Investments, Inc. v. Cincinnati* (1997), 122 Ohio App. 3d 126, 137, 701 N.E.2d 400; *Norwell v. Cincinnati* (1999), 133 Ohio App. 3d 790, 729 N.E.2d 1223.

does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.[52]

{¶81} The doctrine recognizes the strong public interest in protecting public officials from the costs of defending against claims. A public official's entitlement to avoid the burdens of litigation "is an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial."[53] To this end, a ruling on the issue of qualified immunity should be made as early as possible in the proceedings, before the commencement of discovery.[54] "[A] quick resolution of a qualified immunity claim is essential."[55]

{¶82} "Where a defendant official is entitled to qualified immunity, the plaintiff must plead facts which, if true, describe a violation of a clearly established statutory or constitutional right of which a reasonable public official, under an objective standard, would have known. The failure to so plead precludes a plaintiff from proceeding further, even from engaging in discovery, since the plaintiff has failed to

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[52] *Harlow v. Fitzgerald* (1982), 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396.

[53] *Mitchell v. Forsyth* (1985), 472 U.S. 511, 526, 105 S. Ct. 2806, 86 L. Ed. 2d 411.

[54] *Id.*

[55] *Will v. Hallock* (2006), 546 U.S. 345, 126 S. Ct. 952, 960, 163 L. Ed. 2d 836.

allege acts that are outside the scope of the defendant's immunity."[56]

{¶83} In this case, Cleveland alleged that the city employees had violated its rights to due process and equal protection by failing to apply the cap in CMC 321-37 and by rejecting its bid as nonresponsive after applying provisions of a race-conscious program. These allegations were insufficient as a matter of law to describe a violation of a clearly established constitutional right. As demonstrated by the complex nature of the issues already discussed, the individual defendants could not have reasonably known that their actions were unconstitutional. Accordingly, we overrule Cleveland's fifth assignment of error.

Conclusion

In conclusion, we reverse the trial court's entry of a directed verdict on Cleveland's claim for lost profits under Section 1983. We remand the cause for a new trial on the issues of liability and damages under Section 1983. In all other respects, the trial court's judgment is affirmed.

Judgment accordingly.

HILDEBRANDT, P.J., and **PAINTER, J.**, concur.

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[56] *Salt Lick Bancorp v. FDIC* (May 30, 2006), C.A.6 No. 05-5291, ___ F.3d ___, 187 Fed. Appx. 428, citing *Kennedy v. Cleveland* (C.A.6, 1986), 797 F.2d 297, 299.

APPENDIX F

COMMON PLEAS COURT
HAMILTON COUNTY, OHIO

CASE NO: A0402638

[October 7, 2005]

Cleveland Construction, Inc.,
Plaintiff,

v.

City of Cincinnati, et al.,
Defendants.

ENTRY DENYING PLAINTIFF'S MOTION FOR A NEW TRIAL

This matter comes before the court on Plaintiff's motion for a new trial based on Plaintiff's position that "the Court's ruling dismissing Cleveland's damage remedy [relating to claimed lost profits and uncertain bid preparation costs] was error...." Plaintiff's motion for a new trial at 5. Plaintiff's position here clearly is not precluded by Plaintiff's earlier observation (in the fee award context) that: "As the Court (and the City) realize, cases where lost profits have been awarded in competitive bidding scenarios involving equal protection challenges are practically nonexistent. Most cases involving successful equal protection challenges to programs

such as the one at issue here result in relief of exactly the same nature as that granted here." Reply Memorandum in Support of Motion of Plaintiff for Award of Attorney Fees and Costs (August 22, 2005) at 7. Nonetheless, for reasons already set forth by the court, including those discussed in the court's post-trial entry of July 13, 2005, the court does not find Plaintiff's argument here well taken. The motion is denied.

SO ORDERED.

/s/ _____
Judge Nelson, Judge

cc: Kelly Lundrigan, 225 West Court Street, Cincinnati, OH 45202

Leonard Weakley, Jr., One West Fourth Street, Suite 900, Cincinnati, OH

David Barth, 537 East Pete Rose Way, Suite 400, Cincinnati, OH 45202

APPENDIX G

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

Case No. A0402638

[Filed August 29, 2005]

Cleveland Construction, Plaintiff,	)
v.	)
City of Cincinnati, et al., Defendants.	)

FINAL JUDGMENT ENTRY

This final judgment entry is based on and incorporates in full the court's post-trial entry of July 13, 2005.

As set forth in that prior entry, the court finds and adjudges that:

1) Defendant the City of Cincinnati ("the City") violated the requirements of Cincinnati Municipal Code Section 321-37 ("Bid; Award to Lowest and Best") in awarding the Convention Center drywall contract at issue to Defendant Valley Interior Systems, Inc. ("Valley") rather than to Plaintiff Cleveland

Construction, Inc. ("Cleveland Construction") when the award was "based primarily upon" compliance with the City's Subcontracting Outreach Program and Valley's bid exceeded Cleveland Construction's by $1,246,022.00. That additional cost exceeded the $50,000 cap established by Code Section 321-37, and the City acknowledged that Cleveland Construction was otherwise qualified to perform the work. In making its award, the City abused its discretion in a manner that harmed the public and denied Cleveland Construction the contract in violation of Cleveland Construction's federally protected due process rights and in violation of 42 U.S.C. Section 1983.

2) The City's Small Business Enterprise program Rules and Guidelines as in effect at the time of contract award and trial create race and gender based classifications for which the City claims no compelling governmental interest and offers no basis to satisfy any appropriate intermediate scrutiny review. The program is to that extent unconstitutional on its face. Further, in the process of soliciting bids in this matter, the City did pressure and encourage bidders, including Plaintiff, to draw upon race and sex-based classifications that the City concedes could not withstand the heightened level of review that the court finds mandated by governing law. The City in that regard violated Cleveland Construction's rights under 42 U.S.C. Section 1983. However, Cleveland Construction failed to establish that the City's race and sex based classifications (as opposed to the City's small business preference) resulted in the loss of the contract at issue.

Further, the court enters a declaratory judgment, in favor of Cleveland Construction and against the City, that City Code Section 321-37(c) in its current form provides, among other things, that where the City elects to enter into a construction contract on the basis of the "lowest and best" bid, and where that selection is based primarily upon the City's determination of the bidders' relative compliance with the City's SBE Subcontracting Outreach Program rules and regulations, the City may not award the contract to a bidder whose bid amount exceeds an otherwise qualified bid by ten percent or fifty thousand dollars.

The court also enters a declaratory judgment, in favor of Cleveland Construction and against the City, that the City's SBE Rules and Guidelines as of the date of trial, and as promulgated by the City as official policy pursuant to City ordinance, contain race and sex based classifications that violate the equal protection clause of the United States Constitution.

The court also enters judgment against the City by permanent injunction prohibiting the City from maintaining or applying any iteration of the SBE Rules and Guidelines provisions specified at pages 13-14 of the court's July 13, 2005 post-trial entry, or any substantially comparable provisions making race or gender based classifications through similar formulations, absent a formal, public determination by the City establishing that such provisions are, in the case of racial classifications, narrowly tailored to advance a compelling governmental interest, or, in the case of gender classifications, substantially related to genuine and important governmental objectives. The court notes that the City acknowledged during this litigation that it was not in a position to make such showings. For the reasons set forth in its July 13, 2005 entry, the court does not enjoin drywall

work (well under progress at this stage) with regard to the Convention Center project.

The court also enters judgment in favor of Cleveland Construction, as the prevailing party and against the City, for its reasonable attorney fees and costs pursuant to 42 U.S.C. Section 1988, in the amount of $433,290.00. In arriving at that figure, the court has declined to award fees for certain preliminary and post-trial activities and for certain matters relating to potential expert witness testimony on matters not directly relevant to the issues presented to the court. The court has reviewed Cleveland Construction's fee application in light of prevailing standards (*see, e.g., Grycza v. Steger* [6th Dist. App. 1994], 97 Ohio App. 3d 82, 84 ["ordinarily a prevailing plaintiff should recover its attorneys fees"]; *Buckhannon Bd. and Care Home, Inc. v. W. Va. Dept Health and Human Resources* [2001], 532 U.S. 598; *Morscott, Inc. v. City of Cleveland* [6th Cir. 1991], 936 F.2d 271 [absent special circumstances, trial court "'must'" award fees to the prevailing plaintiff]), and with regard for the degree of success obtained through judicially enforceable remedies that alter the contemplated future legal relationship of the parties. The court does not find the City's memorandum in opposition to any fee award persuasive (including the City's less than full account of its shifting positions on whether its own Rules and Guidelines even had been formally promulgated, *cf.* City's May 11, 2005 brief at 13 arguing that the Rules and Guidelines as attached to Cleveland Construction's amended complaint "do not have the force of law" and are not "official policy" - a matter of significance to both prongs of Plaintiff's action).

Court costs as recorded by the Clerk of Courts are assessed to the Defendants to be shared equally between them. Although Valley's legal arguments did not prevail to the (very

considerable) extent that they mirrored the arguments of the City on those issues as to which the court awards judgment to Plaintiff Cleveland Construction against the City, the court awards no separate relief against Valley and enters judgment for Valley to that effect for the reasons stated in the July 13, 2005 post-trial entry.

This is a final order and there is no just cause for delay. The Clerk of Courts is directed to serve notice of this final judgment upon the parties in accordance with the civil rules.

SO ORDERED

/s/
Fred Nelson
Judge

cc: Kelly Lundrigan, 225 West Court Street, Cincinnati, OH 45202 (fax: 721-4268)

Leonard Weakley, Jr., One West Fourth Street, Suite 900, Cincinnati, OH 45202 (fax: 381-9206)

David Barth, 537 East Pete Rose Way, Suite 400, Cincinnati, OH 45202 (fax: 852-8222)

APPENDIX H

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

CASE NO.: A040263

[Filed August 19, 2005]

CLEVELAND CONSTRUCTION, INC.,
Plaintiff,

- VS -

CITY OF CINCINNATI, et al.,
Defendants.

AGREED ENTRY

It is agreed by counsel for the City and Cleveland Construction Company that the hearing scheduled for August 19, 2005 at 1:30 p.m. for Cleveland's Motion for legal fees is hereby moved to a report hearing on August 26, 2005 at 2:30 p.m. as counsel has agreed to submit the issue on briefs to the Court. All other agreements and prior Orders or Entries stay in effect. Counsel for Cleveland Construction Company will submit its Reply Brief on or before August 22, 2005.

/s/
Judge Nelson

HAVE SEEN:

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City Solicitor

/s/_____
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/s/_____
[Per Telephone Authorization of 8/19/05]
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APPENDIX I

IN THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

Case No. A0402638

[Filed August 11, 2005]

Cleveland Construction, Inc., Plaintiff,	)
v.	)
City of Cincinnati, et al, Defendants.	)

ENTRY

The Plaintiff issued a subpoena to Rendigs, Fry, Kiely & Dennis, L.L.P for billing records related to this litigation. The City of Cincinnati filed a Motion to Quash the subpoena. The Court, after carefully considering the matter, and after hearing arguments from counsel, made on August 4, 2005, grants the City of Cincinnati's Motion to Quash as expressed on the record of the hearing.

_____ /s/ _____
Date Judge Nelson

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APPENDIX J

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

Case No. A0402638

[Filed July 20, 2005]

Cleveland Construction, Inc., Plaintiff,	)
v.	)
City of Cincinnati, et al, Defendants.	)

ENTRY

By agreement of the parties, a hearing on attorneys fees in this matter is established for August 9, 2005 at 3:00 p.m.. The parties request and agree that a final judgment entry be deferred until a result is reached on fees after that hearing. Plaintiff will file its Application for fees and costs by July 29, 2005, and serve Defendants in person or by telefax by that date. The City agrees to observe and abide by the injunctive restraint indicated in the Court's post-trial entry of July 13, 2005 pending final judgment entry. The fee hearing relates to a determination of Plaintiff's fees to be paid by the City.

/s/
Judge Fred Nelson

/s/Kelly Lundrigan for Plaintiff Cleveland Construction
Attorney (0059211)

/s/Leonard A. Weakley, Jr. atty for the City of Cincinnati
Attorney

/s/David L. Barth atty for Defendant Valley Interior
Systems, Inc.

APPENDIX K

COMMON PLEAS COURT
HAMILTON COUNTY, OHIO

CASE NO: A0402638

[Filed July 13, 2005]

Cleveland Construction, Inc., Plaintiff,	)
v.	)
City of Cincinnati, et al., Defendants	)

ENTRY

This matter proceeded to a trial on the merits of Plaintiff's case combined with an evidentiary hearing on Plaintiffs Motion for Preliminary Injunction pursuant to Civil Rule 65(B)(2) and under a schedule referenced in the court's May 13, 2005 Entry Denying Defendants' Motions for Summary Judgment and Denying Plaintiff's Motion for Partial Summary Judgment and [preliminary] Injunctive Relief [SJ Entry]. That prior entry sets forth in some detail the legal context of this action, which arises from a dispute relating to drywall work for the expansion and renovation of Cincinnati's Convention Center. A jury was impaneled to address certain issues in the case, after the court granted the motion of Defendant, the City

of Cincinnati, for a directed verdict with regard to Plaintiff, Cleveland Construction, Inc.'s, claim for lost profits, as referenced below, the parties agreed that the litigation should proceed as a trial to the court and the jury was discharged by the consent of all sides (a matter as to which Plaintiff subsequently took some issue). The trial now has concluded, and the court has heard the evidence and counsels' closing arguments and also has reviewed the final materials presented in writing.

I. The City violated its Code requirement, that a determination to award a City contract primarily on the basis of compliance with the City's Subcontractor Outreach Program (designed to favor subcontracting to small businesses), not cost taxpayers more than $50,000 .00 beyond the amount submitted in a lower and otherwise qualified bid.

The evidence is clear and the parties agree that in the determinative second round of bidding to perform the drywall work, the bid submitted by Plaintiff Cleveland Construction, Inc. ("Cleveland," or "Plaintiff") was lower by $1,246,022.00, than the bid submitted by Defendant, Valley Interior Systems, Inc ("Valley") Nonetheless, Defendant City of Cincinnati ("the City") awarded the drywall contract to Valley as the "lowest and best" bidder, because Valley agreed to subcontract at least 35% of the work to small business enterprises ("SBEs") while Cleveland did not. Defendants have maintained throughout this litigation that Plaintiff Cleveland was excluded from contract consideration because it failed to meet the City's SBE requirement. The evidence provides no indication of other infirmities in Cleveland's bid or capacity to perform the work, and the City previously had conceded that Cleveland was otherwise qualified to perform the work, *see* SJ Entry at 10. The court finds that the City's 35% SBE requirement was the only

reason that the City awarded the contract to Valley rather than to Cleveland, despite the one and a quarter million dollar difference between the bids.

The City's Code section 321-37, "Bid, Award to Lowest and Best," provides in part:

> "(a) Selection of Lowest and Best in Award of City Contracts. Except where otherwise provided by ordinance, the city purchasing agent shall award a contract to the lowest and best bidder ...
>
> (c) Factors to be Considered Other factors that the city purchasing agent *may* consider in determining the lowest and best bid include, but are not limited to [prior performance, prevailing wage history, compliance with nondiscrimination rules, and]
> *(4) Information concerning compliance with the 'SBE Subcontracting Outreach Program' rules and regulations issued by the city manager pursuant to section 323-31*
>
> *In the event that the selection of the lowest and best bidder is based primarily upon factors 3 or 4 above, the contract award may be made subject to the following limitation: the bid may not exceed an otherwise qualified bid by ten (10%) percent or Fifty Thousand Dollars ($50,000.00), whichever is lower,"* (emphasis added).

As the court noted in its SJ Entry, the language of 321-37 establishes that "information concerning compliance" with the City's SBE Subcontracting Outreach Program rules and regulations is a "[f]actor" that "may" be considered as the City determines the lowest and best bid. If the lowest and best bid is indeed selected "based primarily" on that factor, the City may proceed to award the contract "subject to the

following limitation: the bid may not exceed an otherwise qualified bid by ten (10%) percent or Fifty Thousand Dollars ($50,000.00), whichever is lower," 321-37(c)(4).

In that context, the phrase "otherwise qualified bid" can reasonably be read only to mean a bid that is qualified except that it is not in "compliance" with the SBE Subcontracting Outreach Program "factor". The bid not selected "primarily" because of the SBE Subcontracting Outreach Program factor must "otherwise" be qualified in order to trigger the required calculation with regard to whether the contract award may be made as selected on that basis. As the court also observed in its SJ Entry at 15, the City Administration, through then Assistant City Manager Rashid Young, advised Cincinnati City Council's Law and Public Safety Committee prior to enactment of this 10%/$50,000.00 cap that, "[w]hat this ordinance allows us to do is be clear about when it is appropriate to award a bid to a SBE compliant [bidder] if they are not the lowest. This ordinance would allow us to award a bid if the bid is $50,000.00 or less difference away from the lowest bid. We had an example where the SBE-compliant bidder was some nine hundred thousand dollars in excess of the lowest bid, and it doesn't make a lot of sense to spend nine hundred thousand dollars more to comply with the regulations of SBE." This explanation of a taxpayer protection rationale for the cap is fully consistent with the Code language that Cincinnati Council promptly adopted.

The 321-37(c) cap protecting Cincinnati taxpayers from having to pay more than $50,000.00 extra (extra, that is, beyond the amount established by a lower and otherwise qualified bid) for the benefit of SBE Subcontracting Outreach Program compliance was adopted in specific contemplation of the Convention Center project; it took effect only months before the contract at issue was awarded. *See* Plaintiff's trial

exhibit 13-A (noting that "this ordinance is an emergency measure. The reason for the emergency is the immediate need to proceed with the bidding of the Convention Center and major development projects, which may be impacted by Section 321-37 of the Cincinnati Municipal Code.")

The court parsed the language of 321-37 at some length in its SJ Entry (pages 10-23), and incorporates here that statutory construction. As earlier observed, the cap applies specifically (and exclusively) to instances where a higher bid is accepted because of "information concerning compliance with 'SBE Subcontractor Outreach Program rules,' issued pursuant to 323-31 ['Subcontracting Outreach Program']" Code 321-37(c). (The Code's reference to program "rules" rather than to the program itself reflects a rather unusual drafting approach through which City Council adopted its Subcontracting Outreach Program simply by reference to a consultant's recommendations and through authorization of administratively promulgated rules in the absence of any further legislative definition of the Program Code 323-31.)

Until the eve of trial, the City had maintained that, despite the clear instruction of Code Section 323-31 requiring that the "City Manager shall issue rules and regulations to carry out the meaning and purpose of the Subcontracting Outreach Program," the City had not formally promulgated its Small Business Enterprise Program Rules and Guidelines containing Subcontracting Outreach Program rules. *See, e.g.*, City's March 11, 2005 Memo Opposing Plaintiff's MSJ at 13. At trial, however, the City stipulated that the Small Business Enterprise Program Rules and Guidelines introduced as Plaintiff's exhibit 17 are what they purport to be and were, in fact, adopted as of April 1, 2003. Those Rules and Guidelines set forth at pages 4-22 the "Components of the [City's] SBE

Program," including (at 9-14) the "Subcontracting Outreach Program".

As established by the City, the "Subcontracting Outreach Program applies to City-funded construction contracts of $100,000.00 or more," *Id.* at 9. Further, the "Subcontracting Outreach Program requires bidders to make subcontracting opportunities available to a broad base of qualified subcontractors and achieve a minimum of 20% (which may be higher for construction of buildings) SBE subcontractor participation. *To be eligible for award of this project, the SBE bidder must subcontract a minimum percentage of its bid to qualified available SBE subcontractors," Id.* (emphasis added). *See also* Plaintiff's trial ex. 5, the "legislative recommendation" that City Council adopted by reference in establishing the SBE Subcontractor Outreach Program and in authorizing promulgation of rules and regulations therefore ("Failure to comply with the City's Subcontracting Outreach Program will cause a bid to be rejected Terms and conditions of this Subcontracting Outreach Program apply to City-funded construction projects of $100,000.00 or more"). Thus, the Subcontracting Outreach Program is a subset of the City's broader Small Business Enterprise Program, it applies to all City construction projects costing $100,000.00 or more, and it incorporates requirements that a certain "minimum percentage" of a bid go to qualified SBEs. With regard to covered projects, the Subcontracting Outreach Program establishes mechanisms for assuring a more firm particularized, and project-specific SBE requirement than the aspirational city-wide annual "goal" of 30% SBE participation set forth at Section 323-7 of the Code. *See also, e.g.,* trial testimony of City consultant Rodney Strong (mandatory aspect of Subcontracting Outreach Program minimum percentage requirements).

Having considered all of the evidence adduced, the court finds by clear and convincing evidence that the award of the contract at issue here was "based primarily" upon "information concerning compliance with the 'SBE Subcontracting Outreach Program' rules and regulations issued pursuant to section 323-31." Valley won the contract on re-bid because it exceeded the 35% SBE participation figure that the City established for this project under the SBE Subcontracting Outreach Program, while Cleveland did not. Plaintiff's trial exhibit 32, for example, is a City bid document issued to the bidders on this project and setting forth the applicable "SUBCONTRACTING OUTREACH PROGRAM SUMMARY." That program summary prominently featured the "SBE Goals Per Trade Contract Cincinnati Convention Center," establishing that "All bidders are required to meet the goal stated for the individual trade contract Drywall 35%." The Subcontracting Outreach Program, to the extent of its legislative formulation, was in place at the time of bid solicitation and the contract award (and was to be applied to construction contracts of $100,000.00 or more). *See also, e.g.*, Riordan trial testimony and Plaintiff's trial ex. 56 (1/21/03 memo contemplating application to Convention Center project of legislation containing Subcontracting Outreach Program authority). In place later, but also in effect by the time of bid solicitation and award, was the $50,000.00 taxpayer protection cap on the amount that the program could cost the City on any one contract -- and that limitation was part of a package enacted specifically in contemplation of the Convention Center project. That the cap was not in place during initial planning stages of the project does not obviate its mandate once enacted.

Thus, the court finds that the City did violate a specific prohibition of its own municipal Code in awarding the drywall

contract to Valley as the "lowest and best bidder" over Cleveland in order to favor small business enterprise subcontracting despite the additional cost to taxpayers of some $1,246,022.00 (an excess expenditure of $1,196,022.00 beyond what the 321-37 cap permits). Cincinnati's local rules limit the discretion of contracting officials in awarding such contracts where the officials purport to be determining the "lowest and best" bid. Where the City publicly determines that a lowest and best bid is not "in the best interest of the city," it may reject such a bid for that reason, *see e.g.,* Code 321-67, but the law requires that it do so plainly and openly (and for some legitimate, non-arbitrary reason, *see City of Dayton, ex rel Scandrick v. McGee* [1981], 67 Ohio St 2d 356). Where no such other rationale exists and the City purports to award a contract on the basis of the "lowest and best" bid, it is constrained by the standards it has established at 321-37, including the cost cap for awards where the lowest and best determination is based primarily on Subcontracting Outreach Program rules.

In determining whether the City abused its discretion under Ohio law and deprived Plaintiff Cleveland of a constitutionally protected property interest without due process of law by awarding the contract in a manner contrary to governing Code, the court refers to its discussion of the applicable legal standards from its SJ Entry: "'The meaning of the term 'abuse of discretion' ... connotes more than an error of law or judgment, it implies an unreasonable, arbitrary or unconscionable attitude.' 'Arbitrary' means 'without adequate determining principle, *** not governed by any fixed rules or standard'. 'Unreasonable' means 'irrational'" *Cedar Bay Construction, Inc. v. City of Fremont et al.,* 50 Ohio St. 3d 19, 22, citations omitted. Moreover, "courts in this state should be reluctant to substitute their judgment for that of city officials in determining which party

is the 'lowest and best bidder.' [I]n the absence of evidence to the contrary, public officers [and] administrative officers, within the limits of the jurisdiction conferred by law, will be presumed not to have acted illegally." *Id.* at 21. Discretion for determining the lowest and best bid "'is not vested in the courts and the courts cannot interfere in the exercise of this discretion unless it clearly appears that the city authorities in whom such discretion has been vested are abusing the discretion.'" *Id.* at 21 (citation omitted). *See also, e.g., Greater Cincinnati Plumbing Contractors' Association v. City of Blue Ash* (1st Dist. 1995), 106 Ohio App. 3d 608, 613-14 (a charter city's discretion in accepting lowest and best bid "is similar to the discretion provided under general state law [citing R.C.735.05], "Competitive bidding provides for 'open and honest competition in bidding for public contracts and [saves] the public harmless, as well as bidders themselves, from any kind of favoritism or fraud in its varied forms'").

For a property interest in the award of a public contract to inhere, "one must have more than a unilateral expectation, rather, one must instead have a legitimate claim of entitlement to such a contract." *Cleveland Construction, Inc. v. Ohio Department of Administrative Services* (10th Dist. 1997), 121 Ohio App. 3d 372, 394. Thus, "a disappointed bidder to a government contract may establish a legitimate claim of entitlement protected by due process by showing that local rules limited the discretion of officials as to whom the contract should be awarded," and that discretion was abused in depriving the bidder of the award, *Id.* at 394-95 (no abuse of discretion found), *see also, e.g., Enertech Electrical, Inc. v. Mahoning Co Commissioners* (6th Cir. 1996), 85 F.3d 257, 260. ("A constitutionally protected property interest in a publicly bid contract can be demonstrated [if a bidder can show] that, under state law, the County had limited discretion, which it abused, in awarding the contract', no

abuse of discretion found), *Peterson Enterprises, Inc. v. Ohio Department of Mental Retardation* (6th Cir. 1989), 890 F.2d 416 ("if the board had limited discretion under local rules as to whom should be awarded the contract, then Plaintiff might have a protected property interest in the award if he were the beneficiary of the state law mandate," no property interest where state guidelines were nonexhaustive), *cf. United of Omaha Life Ins. Co. v. Solomon* (6th Cir. 1992), 960 F.2d 31, 34 ("Michigan law neither requires that the lowest bidder be awarded a state contract nor creates a property interest in disappointed bidders on state contracts"), *Cementech, Inc. v. City of Fairlawn* (Ohio 9th Dist. App.), 2005 WL 844948 (disappointed bidder whom jury found had submitted lowest and best bid may qualify for money damages when project is already complete), *but see, Miami Valley Contractors, Inc. v. Montgomery Co.* (2nd Dist. App.), 1996 WL 303591("as best we can determine, this jurisdiction has never recognized a constitutionally protected property interest of a disappointed bidder on a public works project"), *Miami Valley Contractors, Inc. v. Oak Hill* (4th Dist. App. 1996), 108 Ohio App. 3d 745, 752 (no abuse of discretion found, "we can find no support for the proposition that a second- or third-place finisher in a lowest and best bidder determination acquires a constitutionally protected property right").

Having heard the evidence at trial, the court finds that the City did abuse its discretion in a manner that harmed the public and denied Cleveland the contract award, and that Cleveland did have a "legitimate claim of entitlement" sufficiently clear under the Code (with its 321-37 cost cap) to establish a due process violation. The City established a "fixed rule," in the language of *Cedar Bay,* that it then ignored when it awarded the contract to Valley based primarily on SBE attainment, despite the City Code's instruction that such SBE requirements should not cost the

taxpayers more than $50,000 per contract. *Cf. Greater Cincinnati Plumbing Contractors' Ass'n. v. City of Blue Ash* (1st Dist. App. 1995), 106 Ohio App. 3d 608, 614 ("Competitive bidding provides for 'open and honest competition in bidding for public contracts and [saves] the public harmless, as well as bidders themselves, from any kind of favoritism or fraud in its various forms'," quoting *Cedar Bay), Scandrick,* 67 Ohio St. 2d at 360. ("While municipal governing bodies are necessarily vested with wide discretion, such discretion is neither unlimited not unbridled. The presence of standards against which such discretion may be tested is essential, otherwise, the term 'abuse of discretion' would be meaningless"), *Mechanical Contractors Ass'n. of Cincinnati v. University of Cincinnati* (10th Dist. App. 2001), 141 Ohio App. 3d 333, 343 (public entitles should not be at liberty "to violate laws intended to benefit the public" in contracting), *Cementech,* 2005 WL 844948.

II. The City's Small Business Enterprise Program, as reviewed in light of its SBE Rules and Guidelines, contains elements that create race and gender based classifications for which the City claims no compelling governmental interest. The program is to that extent unconstitutional. As applied in this case, however, those unconstitutional elements did not cause Cleveland to lose the contract award, rather, Valley was awarded the contract because of its higher SBE subcontracting percentage as calculated without regard to race or gender.

Plaintiff asserts and the City concedes that Plaintiff intends and is positioned to bid on future City contracts and that it has standing to mount an equal protection clause challenge to the City's SBE program as that program currently is constituted.

Very significantly to this assessment, the City has stipulated that it lacks the necessary factual basis to withstand any "strict scrutiny" review of its SBE program. If any part of the SBE program must comply with strict scrutiny standards in order to survive constitutional challenge, the City agrees that such elements must be invalidated as unconstitutional at this time. That is, the City concedes that it is not in a position to prove any "compelling governmental interests" that could sustain a racial classification program no matter how "narrowly tailored." The City also has failed to present or argue any significant evidence showing that its program could satisfy any "intermediate scrutiny" review.

Justice O'Connor has set forth the determination by the United States Supreme Court that ..."the Fourteenth Amendment requires strict scrutiny of all race-based action by state and local governments," *Adarand Constructors, Inc. v. Pena* (1995), 515 U.S. 200, 222, citing *Richmond v J.A. Croson Co.* (1989), 488 U.S. 469. "'A free people whose restitutions are founded upon the doctrine of equality' should tolerate no retreat from the principle that government may treat people differently because of their race only for the most compelling reasons. Accordingly, all racial classifications, imposed by whatever federal, state, or local government actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests," *Id.* at 227, *see also, e.g., Grutter v. Bollinger* (2003), 539 U.S. 306, 326 (strict scrutiny required for all governmentally imposed racial classifications), *Monterey Mech Co. v. Wilson,* 125 F.3d 702, 713 (9th Cir. 1997)("burden of justifying different treatment by ethnicity or sex is always on the government"). Given the City's stipulations on standing and strict scrutiny, the court is

required to examine whether the City's SBE program imposes classifications subject to such heightened review.

Plaintiff points to nothing in the Constitution or laws of the United States or of the State of Ohio that creates a heightened standard of judicial review for a governmental program that simply favors small business enterprises at the expense of larger competitors. The issue here is not classification by size, but rather by race or gender.

Further, the law does not prohibit governmental entities from recording statistics relating to race or gender, or from tracking the progress of groups as identified by such categories, or from seeking to ascertain whether any impermissible, discriminatory barriers are hampering the advancement of individuals within groups as defined by race or gender. Thus, for example, the fact that the City reviews statistics relating to contract awards to Minority Business Enterprises ("MBEs," as defined at 323-1-M) or Women's Business Enterprises ("WBEs," as defined at 323-1-W) pursuant to 323-17 ("City Maintained Records and Reports") itself does not establish a requirement of heightened scrutiny. *See, e.g., Croson,* 488 U.S. at 492 (plurality op. of O'Connor, J.) ("a state or local subdivision has the authority to eradicate the effects of private discrimination within its own legislative jurisdiction ... and can use its spending powers to remedy private discrimination, if it identifies that discrimination with the particularity required by the Fourteenth Amendment"). Even the identification of specified "MBE/WBE annual participation goals," to be used in conjunction with "monitor[ing], track[ing], and report[ing]" purposes alone, as set forth in 323-7(a), without further mechanism to promote or effectuate or encourage others to meet such goals in any particular context, may not threaten cognizable injury to this Plaintiff. *Cf. Safeco Ins. Co. v. City*

of White House, Tenn. (6th Cir. 1999), 191 F.3d 675, 690, 692 (cited in filings made by both parties and in City's proposed jury instructions) ("Outreach efforts may or may not require strict scrutiny," citing authority for proposition that such scrutiny generally does not apply to outreach efforts targeting particular race).

However, "where 'outreach' requirements operate as a *sub rosa* racial preference - that is, where their administration 'indisputably pressures' contractors to hire minority subcontractors — courts must apply strict scrutiny" *Safeco,* 191 F.3d at 692. The City's Small Business Enterprise Program Rules and Guidelines, disavowed by the City as unofficial until the eve of trial and then acknowledged as formally promulgated as of April 1, 2003, *see* Plaintiff's trial exhibit 17, contain a number of such elements when reviewed as a complete program. The City's Rules and Guidelines state, for example, that:

1) "all bidders are required to use good faith efforts to promote opportunities for Women and Business Enterprises to participate in *to the extent of their [governmentally specified] availability,* contracting. Prior to the award of any contract related to construction services or professional services, the City shall evaluate each bidder's documented efforts to achieve the participation of minority and women business enterprise firms." Rules and Guidelines, Plaintiff's trial exhibit 17, at 5 (emphasis added), *cf. Virdi v. Dekalb Co School Dist* (11th Cir. 2005), 2005 WL 1389942 (nonbinding "goals" for "minority vendor involvement" linked to specific notice and advertising outreach programs are racial classifications subject to strict scrutiny).

2) "Upon its successful completion, the Non-Discrimination Program [component of the SBE program] will result in utilization of minority and women owned firms *to the extent of their [governmentally specified] availability*." Rules and Guidelines at 6 (emphasis added).

3) "The City will evaluate efforts made by bidders to promote opportunities for minority and women owned firms to compete for business as subcontractors and/or material or equipment suppliers at the time of bidding. If the evaluation determines that a bidder has failed to *achieve* levels of minority and women business enterprise *participation* as might be reasonable on the basis of objective data regarding availability and capacity of such business, the bidder shall be subject to an inquiry by the Office of Contract Compliance." *Id.* at 6 (emphasis added), *cf. MD/DC/DE Broadcasters Assn. v. Fed. Communications Com.* (D.C. Cir. 2001), 236 F.3d 13 (potential investigation of recruitment efforts based on applicant pool numbers is a "powerful threat" giving rise to strict scrutiny review).

4) "Bidders [operating under the Subcontracting Outreach Program] should be able to include the participation of minority and female firms at the levels of availability determined in the City of Cincinnati Disparity Study. "Rules and Guidelines at 9 (referencing a study that the City concedes does not reflect a compelling governmental interest in pursuing a program of racial classification).

5) "[Using form 2007,] [o]fferor will provide a detailed description of the techniques used to obtain

participation of minority and women owned business enterprise ... " *Id.* at 43.

6) "Utilizing the bidder's utilization form (Form 2003) and total bid amount, the actual utilization percentage is calculated. This is accomplished by taking the amount of the subcontracts awarded to minority and women-owned businesses and dividing by the total bid amount If this amount is equal to the estimated availability, then no further inquiry is needed. If the actual utilization is less than the estimate, then further inquiry is warranted. The contract administrator must look at the bidder's solicitation form and contact the minority and women-owned businesses listed on the form to verify that they were contacted by the bidder and what their response was. The administrator must also review the good faith efforts taken by the bidder. The burden is on the bidder to explain the low utilization percentage. If the contract administrator determines that the contractor under-utilized minority and/or women-owned businesses based on the actual [government specified] availability percentage, and that the bidder's good faith efforts were inadequate and there is no legitimate explanation for the under-utilization, then the matter is turned over to the investigative unit for a discrimination investigation." *Id.* at 46; *cf. MD/DC/DE Broadcasters, supra.*

7) [From the "Pre-bid/Outreach Session Script for Contract Administrator"] "Bidders are required to show that they've made a good faith effort to get the *maximum practical participation* of minority and women-owned businesses on this project. [I]f it is feasible that the work can be broken into two or more smaller units, then it should be done so as to permit

maximum participation, based on the availability estimate." Rules and Guidelines at 49 (emphasis added).

8) Every bidder is to submit a "Statement of Good Faith Efforts" certifying that, "we have utilized the following methods to obtain the *maximum practicable participation* by small, minority and women-owned business enterprises on this project." *Id.* at Form 2007 (emphasis added).

As constituted, therefore, to include the officially promulgated Rules and Guidelines authorized and required by Code 323-5, the City's Small Business Enterprise Program contains a variety of elements through which the City makes classifications by race and sex and "indisputably pressures" contractors to recruit and use subcontractors on those terms. This case is different from many other cases involving government race and sex classifications in that the City advances no evidence to suggest that these elements of its program could withstand the heightened scrutiny applied under U.S. Supreme Court precedents. The constitutional inquiry is foreshortened because the City concedes that it cannot satisfy any strict scrutiny review of its program. Thus, the program is unconstitutional on its face to the extent that the City engages in classification by race or sex with regard to City contracting in construction projects. To that extent, as identified above, Plaintiff prevails on its facial challenge under 42 U.S.C. Section 1983.

With regard to the application of those unconstitutional program elements to the facts of this case, the court notes that there is no evidence that any bidder on the contract at issue was privy to the Rules and Guidelines document itself. The court further notes, however, that both Cleveland and Valley

did, in fact, (and without protest by Cleveland until after the contract was awarded to Valley) submit form 2007 ("Statement of Good Faith Efforts") certifying their efforts "to obtain the maximum practicable participation by small, minority and women-owned business enterprises on this project." *See, e.g.,* Plaintiff's trial ex. 28. Those certifications were made after all bidders were provided the "Subcontracting Outreach Program Summary" sheet for the project that included this directive from the City. "You will also find on the cover of this bid document an Availability Determination [of "13.09% Minority /1.05% Female" for the drywall work, *see* Availability Estimation Sheet at Plaintiff's trial ex. 28]. These figures are percentages based on a review of the City's vendor list and certified minority and women-owned businesses.

Bidders should be able to include minority and female firms at the level of availability indicated." Plaintiff's trial exhibit 32 (emphasis added). The City also informed bidders through Addendum 3 to the bid documents that "If the availability estimates are not met, it does not mean that the bid will be deemed non-responsive However, we expect the utilization of SBEs to be reflective of the availability estimates." *See* Plaintiff's trial exhibit 70.

Thus, in the process of soliciting bids, the City did in those respects pressure and encourage bidders to draw upon race and sex-based classifications that the City concedes could not withstand any appropriate heightened review on the facts to which the City is privy. The trial elicited no testimony, however, that the City in fact gave weight to bidders' compliance with MBE or WBE availability estimates in making the contract award with regard to subcontracting percentages, Plaintiff failed to establish that City officials looked beyond whether drywall bidders met the City's 35%

SBE requirement. Indeed, Plaintiff's own chief estimator on the project did testify that in seeking to gain the contract award, his focus in this area was on boosting his company's small business enterprise inclusion rate, and not on attaining any particular MBE or WBE percentages. Valley did not meet the specified WBE percentage, and no evidence was presented at trial that the City rejected any Convention Center bid on the basis of MBE or WBE availability estimates. The evidence indicates that the City awarded the contract to Valley, and not to Cleveland, because Valley's bid complied with the City's requirement that 35 percent of the work go to small business enterprises and Cleveland's bid did not.

With regard to the unlawful discrimination component of the case, therefore, Plaintiff here is much in the posture of the plaintiff in the case that it cites of *Virdi v. Dekalb County School District* (11th Cir. 2005), 2005 WL 1389942. There, the federal court of appeals determined that a school district's aspirational "goals" for minority involvement in contracting, coupled with specific mechanisms for public outreach, created racial classifications that were not narrowly tailored to meet strict scrutiny review, "the program is facially unconstitutional." The court held that, "[n]evertheless, the District is still entitled to judgment on Virdi's intentional discrimination claim While the [program's] goals themselves are unconstitutional, they do not constitute evidence that Virdi himself was discriminated against. Virdi has failed to establish a causal connection between the unconstitutional aspect of the [program] and his alleged injury. Moreover, there is insufficient other evidence to impose liability upon the District for damages to Virdi for intentional discrimination." Similarly here, Cleveland has not established that the City's race and sex based classifications (as opposed to the City's small business preference) resulted in the loss of the contract

award. *Cf. Florida General Contractors v. Jacksonville* (1993), 508 U.S. 656 (traceability requirement).

Nor has Plaintiff met its burden of proof to establish that the City's stated policy to favor small businesses (to the extent that the practice does not cost taxpayers more than $50,000.00 per major construction contract) is in reality a sham to mask invidious discrimination. The court notes as an aside that the City's policy of encouraging small business participation well predates the Subcontracting Outreach Program components of which Plaintiff complains. Further, the court observes that Cincinnati's City Council, at the urging of the Administration, has indeed opted to limit application of Subcontracting Outreach Program small business preferences to circumstances in which such preferences would not add more than $50,000.00 to the cost of a contract. While that newly enacted taxpayer protection cap was not observed in this instance, the evidence does not establish that the provision was ignored as part of a scheme to further race or sex based distinctions, and the fact that the cap was adopted by Code certainly does not further the intentional discrimination theory. Moreover, for example, the City's rejection of all the initial drywall bids, including Valley's, does not bolster the theory that the City's stated preference for SBEs was used here as a "sham" to mask improper considerations of race or sex. Further still, evidence was adduced that the City did award other contracts on the Convention Center project to bidders who did not include any MBE or WBE participation.

In short, Plaintiff has demonstrated that the City's SBE program contains certain race and sex based classifications that cannot pass constitutional muster as constituted at this time; Plaintiff has not established, however, that those aspects of the program caused Plaintiff to lose award of the drywall

contract at issue in this case. *Cf. Texas v. Lesage,* 528 U.S.18 (1999) ("where a plaintiff challenges a discrete governmental decision as being based on an impermissible criterion and it is undisputed that the government would have made the same decision regardless, there is no cognizable injury warranting relief under [Section] 1983" on an 'as applied' challenge).

III. Having prevailed on its abuse of discretion/due process Section 1983 claims and on its claim that specific portions of the City's SBE Rules and Guidelines are unconstitutional on their face, Cleveland is entitled to certain declaratory and injunctive relief. Cleveland also is entitled to its reasonable attorney's fees under 42 U.S.C. Section 1988. Cleveland did not establish, however, that the court should use its equitable powers to enjoin ongoing work with regard to the Convention Center project itself.

The injunctive and declaratory relief sought by Cleveland involve both the administration of future City construction contracts and the disposition of the current Convention Center drywall project.

Plaintiff is entitled to a declaration that City Code Section 321-37(c) in its current form provides, among other things, that where the City elects to enter into a construction contract on the basis of the "lowest and best" bid, and where that selection is based primarily upon the City's determination of bidders' relative compliance with the City's SBE Subcontracting Outreach Program rules and regulations, the City may not award the contract to a bidder whose bid amount exceeds an otherwise qualified bid by ten percent or Fifty Thousand Dollars. The City Administration professed to know the meaning of that Code subsection at the time it was considered by Council; the court trusts that now that further attention has been drawn to the existence of the subsection

(and to the high cost to taxpayers of ignoring it), and now that the City has acknowledged the status of its Subcontracting Outreach Program rules and regulations, no injunctive mandate with regard to future contracts is necessary with regard to that provision of law. Plaintiff Cleveland further is entitled to a declaration that the conduct of the City in ignoring the cost cap de rived Cleveland of a property interest without due process of law.

Plaintiff also is entitled to a declaration that the City's SBE Rules and Guidelines in their current form contain certain race and sex based classifications as enumerated above that, in light of the City's admission that it cannot now offer a compelling governmental interest to satisfy "strict scrutiny" review as required by governing United States Supreme Court precedent, violate the equal protection clause of the U.S. Constitution. The court will enjoin the City from applying those specified Rules and Guidelines provisions to any City construction project absent a formal determination and public showing by the City that such provisions are narrowly tailored to advance a compelling governmental interest of the sort that the City concedes it cannot now establish. Now that the City has acknowledged the status of its Rules and Guidelines, and now that these particular classifications have been identified, and the City has conceded that it is unable to meet any strict scrutiny review, the City is expected to take prompt steps to remove all unconstitutional provisions from its Rules and Guidelines. In this regard, the court is heartened by the City's stated commitment in the Rules and Guidelines (at page 8) to ensure that, "Businesses awarded City contracts shall prohibit discrimination against any person or business on the basis of race, color, sex, religion, disability or national origin. Such businesses shall develop a policy statement to be communicated regularly to all persons and entities involved in the performance of their contracts, and shall conduct their

contracting and purchasing programs so as to discourage any discrimination and to resolve all allegations of discrimination."

In considering Cleveland's request for injunctive relief with regard to the Convention Center drywall contract at issue, the court is mindful that, "A party seeking a permanent injunction must show [that it has 'a right to relief under the applicable substantive law,'] that the injunction is necessary to prevent irreparable harm and that the party does not have an adequate remedy at law. [Such] party must ordinarily prove the required elements by clear and convincing evidence" *Procter & Gamble Co. v. Stoneham* (1st Dist. App. 2000), 140 Ohio App. 3d 260, 267. The merits of Cleveland's claims, including its showing that the City abused its discretion in disregarding the $50,000.00 cost cap under Code Section 321-37, have been discussed above.

Regarding the question of an adequate remedy at law, the court observes that the Defendants' consistent position up to and into trial was that Plaintiff is limited in this action solely to its requests for injunctive and declaratory relief, and that money damages are not an appropriate remedy for Plaintiff's claims. *See, e.g.,* City's May 27, 2005 pretrial statement at 2 ("The City also challenges Cleveland's ability to recover its alleged 'lost profits'"), City's Motion in Limine to Preclude Plaintiff from Presenting Evidence of Lost Profits; City's June 13, 2005 Reply to Response to the Motion in Limine Regarding Lost Profits ("Because Cleveland's only claim is for injunctive relief, Cleveland also is not entitled to a jury trial. Cleveland's constitutional rights, and any claim for redress, can be handled through an action in equity by filing and seeking injunctive relief. Not only does an action for injunctive relief protect Cleveland, but it also protects the taxpayers from having to pay twice for a public project"),

City's June 20, 2005 Memorandum Citing Additional Authority on the Recovery of Lost Profits ("in Ohio lost profits are not available and only injunctive relief available to the plaintiff").

The court agreed with the City that lost profits are not a remedy available under Ohio law to a disappointed bidder on a public contract *See, e.g., O'Rourke Construction Co. v. Cincinnati Metropolitan Housing Authority* (1st Dist. App. 1982), 1982 WL 8613 at n.5 ("We can find no award of damages from public funds even though the contract was given to another bidder as the result of abuse of discretion."); *Hardrives Paving & Constr., Inc. v. Niles* (1994), 99 Ohio App. 3d 243, 247-48 ("The fact that injunctive relief is available generally indicates that a monetary award is not available for lost profits. [I]f we were to allow appellant to receive monetary damages, only the bidders would be protected because the public would have to pay the contract price of the successful bidder plus the lost profits of an aggrieved bidder. However, if injunction is the sole remedy, both the public and the bidders themselves are protected."), *Cavanaugh Bldg. Corp. v. Cuyahoga Cty. Bd. Of Commrs.* (8th Dist. App. 2000), 2000 WL 86554. The court disagreed with the City's proposition, however, that it "must apply state law for purposes of defining the scope of damages under [federal Section] 1983," *cf.* City's June 16, 2005 Motion to Clarify at 2, and concluded that violations of federal law under Section 1983 can give rise to money damages including lost profits where injunctive relief alone would not make a plaintiff whole. *See, e.g., Carey v. Piphus* (1978), 435 U.S. 247, 257-58 ("damages awards under Section 1983 should be governed by the principle of compensation" as developed by the common law of torts, where common law does not provide full compensation, "the task will be the more difficult one of adapting common-law rules of damages to provide fair

compensation for injuries caused by the deprivation of a constitutional right.").

The City's newly adopted assertion at closing that project-specific injunctive relief is precluded because Plaintiff had a complete damages remedy available at law thus rings a bit hollow The court granted a directed verdict for the City on the lost profits issue because Plaintiff - which consistently had sought a combination of money damages and injunctive relief, including project-specific injunctive relief, *see, e.g.*, Amended Complaint and Plaintiff's May 27, 2005 pretrial statement at 2 (seeking remedies including damages, declaratory relief, and "injunctive relief against the City and Valley with regard to the application of the SBE Program to the award of the drywall contract at issue") - failed in its case in chief to provide any evidence whatsoever with regard to the drywall project status or the potential availability of injunctive relief on any balance of the contract, at the close of Plaintiff's case, therefore, there was no factual basis on which assess available damage remedies or on which to instruct the jury to calculate any lost profits for drywall work already completed. *See, e.g.*, Ohio cases *supra* establishing precedence of injunctive relief as opposed to money damages in public bid contracts, *see also, e.g., Milwaukee Co. Pavers Assn. v. Fiedler* (W.D. Wisc. 1989), 707 F. Supp. 1016, 1032 (lawsuit challenging "disadvantaged business" preference in construction contracts. "Plaintiffs would be entitled to money damages [for the alleged federal constitutional violations] *only if* their motion for a preliminary injunction were denied, they were to succeed ultimately on the merits of their claim, *and the state construction projects were to have proceeded so far that they could not reasonably be re-let under non-discriminatory bidding conditions,"* [emphasis added]). The court did not rule and does not find that Plaintiff had available a fully adequate remedy at law. It

is true that no evidence as to the current status of the drywall work (and as to whether there remains any significant portion of that drywall project left for potential injunction) was presented until the City and Valley put forward proof on that subject as part of their defense cases; such evidence now is before the court, however, for any appropriate consideration.

In light of the equitable nature of the remedy sought, and especially given the public nature of the project at issue, the court also should consider whether the public interest would be served or harmed by an injunction and whether third parties would be unduly injured by such a remedy. "[C]aution should be exercised in granting injunctions, and especially so in cases affecting a public interest where the court is asked to interfere with or suspend the operation of important public works or to control the action of another department of government." *White v. Long* (1st Dist. App. 1967), 12 Ohio App. 2d 136, 140, *see also, e.g., Leaseway Centers v. Dept. of Adm. Serv.* (10th Dist. App. 1988), 49 Ohio App. 3d 99, 106 (quoting *White), Cleveland Construction, Inc. v. Ohio Dep't. of Adm. Serv.* (10th Dist. App. 1997), 121 Ohio App. 3d 372, 383 (same).

Certainly there is a powerful public interest in requiring governmental entities to follow the law. Courts across this state have found that interest especially strong in the context of "protecting the integrity of the [public] bidding process." *Cf. Cementech,* 2005 WL 844948 (9th Dist. App.) (noting that where available, "the preferred method of resolving bidding disputes is injunctive relief, as that relief would prevent double payment [for the same project] and better serve the integrity of the bidding process"), *Hardrives Paving,* 99 Ohio App. 3d at 247-48 ("if injunction is the sole remedy, both the public and the bidder themselves are protected"), *Cedar Bay,* 50 Ohio St. 3d at 21 ("The intent of competitive bidding,

under either the state statutes or a municipal charter, is 'to provide for open and honest competition in bidding for public contracts and to save the public harmless, as well as bidders themselves, from any kind of favoritism or fraud in its varied forms.").

Against such considerations the court weighs the potential harm to the public that could be caused by disruption of the ongoing Convention Center work. Defense witnesses testified that the Convention Center project as a whole is approximately sixty percent complete. The drywall work will be roughly 50 percent done by the end of July and is on a "critical path" in which delays could significantly affect other parts of the project. Defendants argue, in effect, that the savings that the City might obtain if it were ordered to shift the remaining drywall work from Valley to Cleveland at Cleveland's bid price are likely to be surpassed by additional costs arising from delay claims and lost Convention Center business. *See, e.g.*, McKillup testimony that potential delay claims could reach into the millions of dollars). Although Defendants couple this argument with the contention that Cleveland delayed unduly in seeking to press its preliminary injunction claim, thereby allowing the project to reach a more delicate juncture, the court is constrained to note that the City seems to have contributed to any perceived need for extensive and lengthy discovery by taking positions such as its longstanding denial, only now abandoned, that it had not officially promulgated SBE Rules and Guidelines at all.

Valley is prepared to perform the balance of the drywall work and, with its subcontractors, would lose any expected remaining profits if the project is enjoined. Valley also presented testimony that a premature end to its contract would mean a loss of work for certain employees in light of the additional worker contingent recently added to the endeavor.

Against that very real concern, the court notes that Valley would not have won the contract or been paid for *any* of the work had the contract been awarded in keeping with the $50,000.00 cost cap, and that Valley and its subcontractors appear to have been well compensated for the work they have performed relative to the significantly lower (and "otherwise qualified") bid submitted by Cleveland.

The court finds that equity would not be served by Cleveland's proposal that Valley be made to disgorge money it already has earned for work already done. Testimony at trial indicates that Valley followed the rules set forth by the City in bidding on the contract, and that it has borne substantial contractual risks associated with its undertaking. The court does not deem Valley's contract with the City void *ab initio,* and it would be inequitable to strip Valley of the compensation it has been given for the work it has undertaken pursuant to contract.

Further, Cleveland provided no testimony whatsoever during its case in chief either with regard to the current status of the Convention Center project or with regard to Cleveland's own current ability to complete the work without delay and disruption to a major City undertaking. On rebuttal, Cleveland offered no testimony to dispute Defendants' position that the Convention Center drywall work is on a "critical path" that is extremely time-sensitive and as to which disruptions would impede other contractors and interfere with planned Convention Center events and broader City interests surrounding the City's economic development program. Cleveland did not offer credible assurances by a witness conversant with the scope of work and the project's current status that Cleveland could take over the job at this stage without undue and costly disruption. The court continues to believe that a Plaintiff in an action of this nature is not entitled

to manufacture heightened claims to lost profits by eschewing serious efforts toward injunctive relief at any stage in the process.

Considering the testimony that was given, including the rebuttal testimony, the court finds that an injunction interfering with the ongoing Convention Center construction work has not been shown to be appropriate upon examination of all appropriate equitable considerations. The court reaches this conclusion reluctantly in light of the course that this litigation took, but it finds that the public interest is a weighty factor in this case involving a major public undertaking, *see, e.g., White,* 12 Ohio App. 2d 136, and that the public interest at this juncture is best served by the combination of declaratory and non-project specific relief outlined above. The court further finds that Cleveland is the prevailing party on its Section 1983 due process claim and on its reasonable attorney's fee under 42 U.S.C. Section 1988. Costs will be assessed against Defendants jointly.

The court will ask the parties to confer, if they wish, on a judgment entry to propose to the court in very short order reflecting these determinations. The court also asks the parties to confer on a date for a hearing on the amount of Cleveland's attorney's fee.

/s/_____
Judge Nelson

APPENDIX L

COMMON PLEAS COURT
HAMILTON COUNTY, OHIO

CASE NO: A0402638

[Filed June 28, 2005]

Cleveland Construction, Inc., Plaintiff,	)
v.	)
City of Cincinnati, et al., Defendants.	)

ENTRY GRANTING DEFENDANT CITY OF CINCINNATI'S MOTION FOR PARTIAL DIRECTED VERDICT, DENYING DISMISSAL OF EQUAL PROTECTION CLAIM, WITHHOLDING JUDGMENT ON DEFENDANT VALLEY'S 41(B)(2) MOTION, AND NOTING STIPULATION THAT REMAINING ISSUES ARE TO BE DETERMINED BY THE COURT WITHOUT A JURY

For the reasons expressed on the record of today's date, the Court grants Defendant City's Motion For A Directed Verdict solely on the issues of lost profit and bid preparation cost.

The Court denies Defendant City's Motion for dismissal of Plaintiff's equal protection claim relating to the administration of the contract at issue in this case.

The Court defers a ruling on Defendant Valley's motion to dismiss under Rule 41(B)(2) and will withhold judgment on such issues until the close of all evidence.

All parties having stated that the remaining issues in this action are appropriate for determination by the Court alone without jury verdict, the jury is discharged with the consent of all parties with regard to all issues remaining in this action. The case will proceed as a trial to the bench with regard to Plaintiff's claims for declaratory and injunctive relief and attorney fees.

SO ORDERED.

/s/
Fred Nelson, Judge

APPENDIX M

COMMON PLEAS COURT
HAMILTON COUNTY, OHIO

CASE NO: A0402638

[Filed June 20, 2005]

Cleveland Construction, Inc.,	)
Plaintiff,	)
	)
v.	)
	)
City of Cincinnati, et al.,	)
Defendants.	)
	)

ENTRY

Pursuant to Civil Rule 65(B)(2) and previously determined with the parties as reflected on the Amended Case Scheduling Order of October 8, 2004, the hearing on Plaintiff's request for preliminary injunctive relief is combined with the trial on the merits of the case as scheduled to begin on June 20, 2005.

SO ORDERED.

/s/
Judge Nelson

APPENDIX N

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

Case No. A0402638

[Filed May 13, 2005]

Cleveland Construction, Plaintiff,	)
vs.	)
City of Cincinnati, et al., Defendants.	)

ENTRY DENYING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND INJUNCTIVE RELIEF

Introduction

This matter comes before the court on the motion of Plaintiff Cleveland Construction, Inc. ("Cleveland") for partial summary judgment and for injunctive relief, and countervailing motions for summary judgment by Defendants the City of Cincinnati ("the City") and Valley Interior Systems, Inc. ("Valley," which has associated itself with the City's legal position for purposes of its motion). The court in

keeping with the requests of the parties conducted a nonevidentiary hearing on the motions, and has reviewed the arguments of counsel, the pleadings and briefs, and the evidence filed of record.

The case involves a dispute related to drywall work needed for the expansion and renovation of Cincinnati's Convention Center. The parties agree that in a second round of bidding to perform the drywall work, Cleveland offered to do the job for $8,889,000 and Valley submitted a bid of $10,135,022. Although Cleveland's bid was lower than Valley's by roughly one and a quarter million dollars, the City awarded the drywall contract to Valley as the lowest bidder that met the City's Small Business Enterprise program ("SBE") criteria. The City states that Valley got the contract because it was prepared to make greater use of small business subcontractors than could Cleveland.

Cleveland subsequently filed this lawsuit, alleging among other matters that the City's SBE program "is a sham to allow the City to use racial and gender-based quotas illegally," and asserting that in awarding the contract to Valley, the City violated Cleveland's equal protection rights and ignored its own municipal code in violation of due process. After a hearing at which this court denied Cleveland's motion for a temporary restraining order, Defendants removed the case to federal court; in due course, the action was remanded here, the court dismissed certain individual defendants, and the parties engaged in extended discovery. Cleveland elected not to pursue application for a preliminary injunction until the filing of the instant motions, which include the summary judgment issues to which the court now turns.

Summary Judgment Standard

Summary judgment is appropriate when it is clear from the facts established in the pleadings and evidential materials of record, as viewed in the light most favorable to the party or parties opposing the motion, that: "(1) no genuine issue of fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) the evidence demonstrates that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party opposing the motion." *See, e.g., Sauter v. One Lytle Place* (1st Dist. App. 2005), 2005-Ohio-1183, citing Civil Rule 56(C). If a party seeking summary judgment meets its initial burden of identifying a basis for the motion together with those parts of the record that "demonstrate the absence of a genuine issue of material fact on the essential element(s) of the ... nonmoving party's claims ...., the nonmoving party then has a reciprocal burden ... to set forth specific facts showing that there is a genuine issue for trial ...." *Dresher v. Burt* (1996), 75 0hio St.3d 280, 293.

Equal Protection Issues

At this stage in the litigation, Cleveland argues that the City's SBE program as designed (to include certain "Rules and Guidelines") and as applied here amounts to a race-conscious awards scheme that the City cannot justify under prevailing constitutional norms. (Plaintiff at this point does not argue that the City has required improper considerations of gender, perhaps because Valley's successful bid did not reflect subcontracting percentages for women-owned firms that approached the City's availability estimates.) The City is frank to respond that it lacks a factual predicate that could satisfy "strict scrutiny" review of a race-conscious program, but argues that its SBE approach as designed and as

undertaken here is race-neutral, rationally based, and constitutionally unexceptionable. The record as presented to date reflects genuine issues of material fact that preclude summary judgment for any side on this part of the dispute.

The City's municipal code provides that "Cincinnati's Annual Goal for SBE participation shall be 30% of the city's total dollars spent for construction ... services ...." Cincinnati Municipal Code ("Code") at 323-7(a). The Code defines a Small Business Enterprise with regard to gross revenues and number of employees; the SBE definition itself does not include factors of race or gender. Code 323-1 -S. The record here may suggest that the City pursues the 30% SBE goal on a project by project basis, establishing different percentages for different project components in order to arrive at the overall 30% figure. The parties agree that with regard to the drywall element of the Convention Center project, the goal was that 35% of subcontracting dollars go to SBEs. *See also, e.g.*, Small depo. at Ex. 5 (City's "Subcontracting Outreach Program Summary" sets Drywall "Goal[ ] For Bid Package C" at 35%).

Standing alone, that SBE goal does not on its face implicate any considerations of race or gender, and the court does not understand Plaintiff to argue that a program undertaken to ensure participation of small businesses is subject to heightened scrutiny simply because it may have the ancillary effect of broadening participation for people in groups as defined by race or gender. Plaintiff argues, however, that the program must be assessed in light of 'Minority Business Enterprise/Women's Business Enterprise' "participation goals of 30% [for] construction ... services [,to be] monitored, tracked internally, and reported annually to city council along with annual SBE participation rates," as also established in Code 323-7(a), and in light both of

"availability estimates" provided by the City to reflect percentages of minority and female controlled subcontractors available for hire in the region, and of SBE "Rules and Guidelines" that imply or direct a race-conscious focus for the program. The City responds that this project, by its terms, involved only SBE goals; that availability estimates, in and of themselves, do not establish any particular hiring requirements; and that the Rules and Guidelines never were officially promulgated and have not been applied, at least in full, to this project.

It is undisputed that in the course of the bidding process, the City was asked why it had provided prospective bidders with an "Availability Estimation Sheet ... Subcontractor Outreach Program (CMC 323-31) noting availability estimates for drywall subcontractors of "13.09% Minority" and "1.05% Female." *See* Amended Complaint at Ex. B and City's MSJ at page 8. The inquiry, disseminated along with the answer to all prospective bidders, continued: "I thought this project only deals with SBEs. Please clarify." The City responded: "This project does deal with SBEs. However, the City of Cincinnati's Disparity Study found that Minorities and Females were underutilized in city contracting projects. .... The minority and female business owner would also have to be certified with the City as a Small Business Enterprise. If the availability estimates are not met, it does not mean that the bid will be deemed non-responsive. However, we expect the utilization of SBEs to be reflective of the availability estimates." Amended Complaint at Ex. H; City's MSJ at 8.

The City submits that this arguably rather opaque answer demonstrates that the drywall bids were governed exclusively by SBE considerations without regard to MBE/WBE concerns. The City points, also, to evidence indicating that a first round of bidding resulted in no contract award because

Valley, while exceeding the MBE availability estimate, did not satisfy the 35% SBE goal. The City further notes testimony of its representatives to the effect that availability estimates did not factor into its bid evaluation, and argues that a stated desire to calculate and track project participation by race does not itself trigger strict scrutiny under such precedent as *Reed v. Agilent Technologies,* 174 F. Supp. 176 (D. Del. 2001). The City, in short, cites to testimony of its representatives that Cleveland was disqualified because it did not meet the 35% SBE goal, and that considerations of race simply did not enter into the determination. *See, e.g.,* purchasing agent Franklin depo. at 46; Ranford at 68 ("when I looked at a bid I did not look at the availability estimation, all I was concerned about was Small Business Enterprise").

Cleveland contends that the City's answer on the relevance of availability estimates should not be construed as advising bidders that the City will not consider race or gender in evaluating bids. Moreover, Cleveland points to Valley's certification of MBE percentages in its winning Subcontractor Utilization Plan, to language in the required Statement of Good Faith Efforts (form 2007, certifying use of any "methods to obtain the maximum practicable participation by small, minority and women-owned business enterprises"), and to language in the Subcontracting Program Outreach Summary stating that "[b]idders should be able to include minority and female firms at the level of availability indicated." *See, e.g.,* Strawser depo. ex. 3; Small depo. ex. 5.

Moreover, Cleveland emphasizes a document titled: "City of Cincinnati/Small Business Division/Office of Contract Compliance/Small Business Enterprise Program/Rules and Guidelines." *See* Townsend depo. ex. 19. That document recites, among other things, that "[i]f ... evaluation

determines that a bidder has failed to achieve levels of minority and women business enterprise participation as might be reasonable on the basis of objective data regarding availability and capacity of such businesses, the bidder shall be subject to an inquiry by the Office of Contract Compliance." Furthermore, the document states, that Office is to examine bid forms to determine "the amount of the subcontracts awarded to minority and women-owned businesses .... If the bidder's utilization is the same as or greater than the actual availability percentage, then the city can accept the bidder's utilization as being in compliance with the program. The burden is on the bidder to explain the low utilization percentage. If the contract administrator determines that the contractor under-utilized minority and/or women-owned businesses based on the actual availability percentage, and that the bidder's good faith efforts were inadequate and there is no legitimate explanation for the under-utilization, then the matter is turned over to the investigative unit for a discrimination investigation." Townsend depo. ex. 19 at 6, 45-46.

For the purposes of these motions, the City does not really argue that such provisions in the "Rules and Guidelines" document are permissible as mechanisms to prevent intentional discrimination by contractors. Rather, the City contends that "[t]he Rules and Guidelines ... were never signed by the City Manager and do not have the force of law," and that "certain portions of the 'Rules and Guidelines' have not been used" in the bid solicitation and evaluation process. *See* City's memo opposing Plaintiff's MSJ at 13; *see also* Lemmie depo; Ranford depo. at 68, 70-73 (City engaged in no evaluation of MBE participation).

Code section 323-31 instructs the City Manager to promulgate rules and regulations for the SBE Subcontracting

Outreach Program; the City Manager, however, has testified that, "I have not promulgated rules and regulations under this section." Lemmie depo. at 10. The City also notes that there is no evidence in the record that the Rules and Guidelines document was made available or known to any bidder prior to the award of the contract at issue; that is, the current record does not reflect that the document directly could have caused any bidder to take race into account in submitting a proposal. The City in effect disavows any problematic portions of the document by arguing that those sections never have controlled the policy of the City or its contractors. On the state of the record to date, that appears to be a genuine issue of material fact (although the court does observe that the City has admitted that the Rules and Guidelines "are ... part of the Small Business Enterprise Program," *see* City's Response to Interrogatory 17(D) at 6).

Viewing the evidence in the light most favorable to the non-moving party, and given that the Rules and Guidelines document was prepared for and available to City staff, and served to some extent as "working documents used by staff," Lemmie depo. at 11 and Stark depo. ex. 6, (and considering, too, presumptions of regularity that generally inform review of governmental actions), the court cannot conclude for summary judgment purposes that the principles embodied in the Rules and Guideline document played no part in the determinations at issue here. By the same standard, with all reasonable inferences drawn in favor of the Defendants in evaluating Cleveland's summary judgment motion, the court cannot find as a matter of undisputed fact that certain sections of the Rules and Guidelines cited above entered into the City's decision. The status of the "Rules and Guidelines," and the issue of to what extent and effect, if any, they were used here or may support other reasonable inferences regarding Cleveland's claim that the SBE program is run as a "sham"

to mask a race-conscious awards program, remain questions of arguably material fact.

In light of the City's response to the bidder inquiry about the relevance of availability estimates, viewed in conjunction with the bid documents and Code mandates and the Rules and Guidelines document, and the testimony of City officials, the court similarly concludes under the summary judgment standard that a question of fact remains as to whether the City did intelligibly and accurately communicate to the bidders that this drywall project was to be administered under SBE principles without regard to considerations of race (as Defendants maintain was the case and which Plaintiff strongly disputes). Moreover, the court notes as an aside that the record indicates arguably conflicting testimony regarding the subjective impressions of the bidders on this score.

In short, whether or not the City has engaged here in a race-conscious contracting program of the sort that would require "strict scrutiny" review depends on a determination of facts that remain at issue when reasonable inferences are drawn in favor of the non-moving parties on each of the summary judgment motions. *Cf. Safeco Ins. v. City of White House, Tenn.* (6th Cir. 1999), 191 F.3d 675, 692 ("Outreach efforts may or may not require strict scrutiny" [citing authority that such heightened review "'is generally inapplicable' to outreach efforts that target one race], "But ... where their administration 'indisputably pressures' contractors to hire minority subcontractors [,] courts must apply strict scrutiny").

The City argues, however, that Cleveland lacks standing to pursue its equal protection claims in any event because it did not meet the 35% SBE standard and therefore could not have been awarded the contract regardless of any other

considerations. *Cf. Florida General Contractors v Jacksonville* (1993), 508 U.S. 656 (traceability requirement). The court finds below however, that the City's Code in some instances precludes award of a contract based primarily on SBE Subcontractor Outreach Program considerations where the winning bid is more than $50,000 higher than the bid of an otherwise qualified contractor rejected for not meeting the SBE goal. Under these circumstances, where the City agreed to pay well more than one million dollars extra in order to achieve 35% participation by small businesses in the drywall project, the undisputed facts do not establish for summary judgment purposes that Cleveland would have been out of the running for the award had the City applied its SBE rules in the context of the Code as written. Thus, Defendants' standing argument fails at this point in the process for reasons even beyond Cleveland's contention that the SBE program itself is wholly a sham to mask impermissible race-conscious awards.

The court therefore denies the motions for summary judgment of all three parties with regard to Cleveland's equal protection claims.

Due Process Issues

Defendants concede that Cleveland's bid to perform the drywall work on the City's Convention Center project was $1,246,022.00 lower than Valley's. City's MSJ Memo at 7 ("Valley's bid was for $10,135,022.00 while Cleveland's bid totaled $8,889,000.00"); Valley's MSJ (adopting "all the same grounds" as City). Defendants also affirm that "Cleveland's bid was excluded from consideration because it failed to meet the SBE requirements," City's MSJ Memo at 7, and they point to no other infirmities in Cleveland's bid or capacity to perform the work. *Cf.* Franklin depo. at 21-22,

29, 62, 88 (City purchasing agent believes that all three bidders met non-SBE bid specifications and that those bids were acceptable to the purchasing department; no issues with Cleveland's prior performance).

Code section 321-37, "Bid; Award to Lowest and Best" provides in part:

"(a) Selection of Lowest and Best in Award of City Contracts: Except where otherwise provided by ordinance, the city purchasing agent shall award a contract to the lowest and best bidder. ...

(c) Factors to be Considered: Other factors that the city purchasing agent *may* consider in determining the lowest and best bid include, but are not limited to: [prior performance; prevailing wage history; compliance with nondiscrimination rules; and]

(4) Information concerning compliance with the 'SBE Subcontracting Outreach Program' rules and regulations issued by the city manager pursuant to ... section 323-31.

In the event that the selection of the lowest and best bidder is based primarily upon factors 3 or 4 above, the contract award may be made subject to the following limitation: the bid may not exceed an otherwise qualified bid by ten (10%) percent or Fifty Thousand Dollars ($50,000.00), whichever is lower."

(emphasis added)

Cleveland contends that in awarding the contract to Valley despite the fact that Valley's bid was more than $50,000 higher than Cleveland's (by more than 1.2 million dollars),

the City abused its discretion and thereby deprived Cleveland of a constitutionally protected property interest without due process of law. Defendants argue that Cleveland was not the lowest and best bidder because it failed to reach the SBE goal without regard to Subcontracting Outreach Program rules. *See* City's memo in op. at 22; Valley's memo in op. at 10 ("Code section 321-37 does not apply ... because Cleveland was not an otherwise qualified bidder eligible for consideration under 321-37").

For a property interest in the award of a public contract to inhere, "one must have more than a unilateral expectation; rather, one must instead have a legitimate claim of entitlement to such a contract." *Cleveland Construction, Inc. v. Ohio Department of Administrative Services* (10th Dist. 1997), 121 Ohio App. 3d 372, 394. Thus, "a disappointed bidder to a government contract may establish a legitimate claim of entitlement protected by due process by showing that local rules limited the discretion of ... officials as to whom the contract should be awarded" and that discretion was abused in depriving the bidder of the award. *Id.* at 394-95 (no abuse of discretion found); *see also, e.g., Enertech Electrical, Inc. v. Mahoning Co. Commissioners* (6th Cir. 1996), 85 F.3d 257, 260 ("A constitutionally protected property interest in a publicly bid contract can be demonstrated .... [if a bidder can show] that, under state law, the County had limited discretion, which it abused, in awarding the contract'; no abuse of discretion found); *Peterson Enterprises, Inc. v. Ohio Department of Mental Retardation* (6th Cir. 1989), 890 F.2d 416 ("if the board had limited discretion under local roles as to whom should be awarded the contract ..., then Plaintiff might have a protected property interest in the award if he were the beneficiary of the state law mandate;" no property interest where state guidelines were nonexhaustive); *cf. United of Omaha Life Ins. Co. v. Solomon* (6th Cir. 1992),

960 F.2d 31, 34 ("Michigan ... law neither requires that the lowest bidder be awarded a state contract nor creates a property interest in disappointed bidders on state contracts"); *Cementech, Inc. v. City of Fairlawn* (Ohio 9th Dist. App.), 2005 WL 844948 (disappointed bidder whom jury found had submitted lowest and best bid may qualify for money damages when project is already complete); *but see, Miami Valley Contractors, Inc. v. Montgomery Co.* (2nd Dist. App.), 1996 WL 303591 ("as best we can determine, this jurisdiction has never recognized a constitutionally protected property interest of a disappointed bidder on a public works project"); *Miami Valley Contractors, Inc. v. Oak Hill* (4th Dist. App. 1996), 108 Ohio App. 3d 745, 752 (no abuse of discretion found; "we can find no support for the proposition that a second- or third-place finisher in a lowest and best bidder determination acquires a constitutionally protected property right").

"'The meaning of the term 'abuse of discretion' ... connotes more than an error of law or judgment; it implies an unreasonable, arbitrary or unconscionable attitude' .... 'Arbitrary' means 'without adequate determining principle; *** not governed by any fixed rules or standard.' .... 'Unreasonable' means 'irrational'." *Cedar Bay Construction, Inc. v. City of Fremont et al.*, 50 Ohio St.3d 19, 22, citations omitted. Moreover, "courts in this state should be reluctant to substitute their judgment for that of city officials in determining which party is the 'lowest and best bidder.' .... [I]n the absence of evidence to the contrary, public officers [and] administrative officers ..., within the limits of the jurisdiction conferred by law, will be presumed ... not to have acted illegally." *Id.* at 21. Discretion for determining the lowest and best bid "'is not vested in the courts and the courts cannot interfere in the exercise of this discretion unless it clearly appears that the city authorities in whom such discretion has been vested are abusing the discretion'." *Id.* at

21 (citation omitted). *See also, e.g., Greater Cincinnati Plumbing Contractors' Association v. City of Blue Ash* (1st Dist. 1995), 106 Ohio App. 3d 608, 613-14 (a Charter city's discretion in accepting lowest and best bid "is similar to the discretion provided under general state law [citing R.C. 735.05]; "Competitive bidding provides for 'open and honest competition in bidding for public contracts and [saves] the public harmless, as well as bidders themselves, from any kind of favoritism or fraud in its varied forms'").

If the bid in the instant case was awarded in violation of the explicit $50,000/10% cap established by 321-37(c)(4), the award would be an abuse of discretion and Cleveland would have a "legitimate claim of entitlement" sufficiently clear to give rise to a due process claim. Violation of that precise standard as established by ordinance would move Cleveland's interest in the contract beyond the "mere 'unilateral expectation'" of receiving the award under a regime in which the relevant ordinance provides non-exhaustive guidelines limiting discretion, *cf. Peterson Enterprise,* 890 F.2d 416; *Cleveland Construction,* 121 Ohio App. 3d at 394, and into that rare context in which a disappointed bidder may assert a constitutionally protected property interest. This is the basis on which Cleveland advances the second part of its motion for partial summary judgment. *See* Motion at 2 (seeking judgment based on an asserted "property interest in the contract"). Under the summary judgment standard, the court thus turns to the question of whether any genuine issue of material fact exists as to whether the City breached its 321-37(e)(4) cap.

The language of 321-37 establishes that "information concerning compliance" with the City's SBE Subcontracting Outreach Program rules and regulations is a "[f]actor" that "may" be considered as the City determines the lowest and best bid. If the lowest and best bid is selected "based

primarily" on that factor, the City may proceed to award the contract "subject to the following limitation: the bid may not exceed an otherwise qualified bid by ten (10%) percent or Fifty Thousand Dollars ($50,000.00), whichever is lower." 321-37(c)(4).

In that context, the phrase "otherwise qualified bid" can reasonably be read only to mean a bid that is qualified except that it is not in "compliance" with the SBE Subcontracting Outreach Program "factor". The bid not selected "primarily" because of the SBE Subcontracting Outreach Program factor must "otherwise" be qualified in order to trigger the required calculation with regard to whether the contract award may be made as selected on that basis.

Cleveland points to legislative history for 321-37 indicating that the City Administration took the position and advised Cincinnati's City Council that the ten-percent/$50,000.00 cap would apply to any purchasing contract affected by SBE compliance issues. Assistant City Manager Rashid Young advised Council's Law and Public Safety Committee on November 25, 2003 that "[w]hat this ordinance allows us to do is be clear about when it is appropriate to award a bid to a SBE compliant [bidder] if they are not the lowest. This ordinance would allow us to award a bid if the bid is $50,000 or less difference away from the lowest bid. .... We had an example where the SBE-compliant bidder was some nine hundred thousand dollars in excess of the lowest bid and ... it didn't make a lot of sense to spend nine hundred thousand dollars more to comply with the regulations of SBE." Young depo. and ex. 1.

By its terms, however, the cap applies specifically (and exclusively) to instances where a higher bid is accepted because of "information concerning compliance with *'SBE*

Subcontractor Outreach Program rules' ... issued ... pursuant to 323-31." Code 321-37(c)(4) (emphasis added). As used in the legislative text, the reference to an "SBE Subcontractor Outreach program" does not appear coextensive with the broader "Small Business Enterprise Program" itself. Thus, for example: Chapter 323 as a whole is titled "Small Business Enterprise Program," while section 323-31 specifically is titled "Subcontracting Outreach Program;" and Section 323-5 directs the City Manager to "issue and enforce regulations to carry out the meaning and purpose of the small business enterprise program authorized by this chapter,'" while Section 323-31 directs the City Manager to "issue and enforce rules and regulations to carry out the meaning and purpose of the Subcontracting Outreach Program, substantially in conformance with the content of Part II, Section I, the 'Legislative Recommendation Report To The City of Cincinnati' dated December 17, 2002, prepared by Griffin & Strong, P,C.."

As Cleveland observes: "A basic rule of statutory construction requires that 'words in statutes should not be construed to be redundant, nor should any words be ignored.' ... No part [of a statute] should be treated as superfluous unless that is manifestly required, and the court should avoid that construction which renders a provision meaningless or inoperative." *D.A.B.E., Inc. v. Toledo-Lucas County Board of Health* (2002), 96 Ohio St.3d 250-256 (citations omitted); *see also* Cleveland's MSJ Motion/Memo at 39. Council enacted 323-31 directing enforcement of regulations for the "SBE Subcontracting Outreach Program" in 2003, while leaving in place the separate 323-5 directive as enacted in 1999 to enforce regulations for the SBE program itself. If the Subcontracting Outreach Program and the overall SBE program were identical, a double instruction on enforcement would be unnecessary and redundant. The specific reference

in 321-37(c)(4) to the SBE Subcontracting Outreach Program thus appears to comprehend something less than the SBE program as a whole (a conclusion strengthened by the structure of Chapter 323).

The distinction between the "SBE Subcontractor Outreach Program" and the overall SBE program may not be terribly complex. The Griffin & Strong Report referenced and to some extent incorporated by Code section 323-31 ("Subcontracting Outreach Program") itself makes clear that "[t]he Subcontracting Outreach Program applies to City-funded construction contracts of $100,000 or more," except where the City "in advance" specifically waives such requirements. Lemmie Depo. Ex. 2 (December 17, 2002 Griffin & Strong Report at 3, 5). That is also the deposition testimony offered by City representatives. *See, e.g.*, Ranford depo, at 78 ("Those are for contracts that are in excess of $100,000"). That distinction, applying the Subcontracting Outreach Program to contracts in excess of $100,000, both would explain the implication in the Code that the SBE Subcontracting Outreach Program is only a subset of the SBE program overall, and could vindicate the City Administration's representation to Council through Mr. Young that 323-31 would preclude the City from paying, for example, "nine hundred thousand dollars more to comply with the regulations of SBE": it gives a widely applicable meaning to the $50,000/10% cap, while also making clear that the cap applies only to relatively large contracts.

The record before the court further reflects that at least some elements of the SBE Subcontractor Outreach Program were applied to the bids at issue. As City contract compliance officer Ranford has testified: "The Subcontracting Outreach Program was applied to convention center bids. If you have any of those bid documents, you will see the Subcontracting

Outreach Program. Those are for contracts that are in excess of $100,000." Ranford depo. at 78; *see also id.* at 60 ("we had the Subcontracting Outreach Program on all convention center projects and they were in excess of $100,000. So we followed how that worked, the goals. The goals were set."), 83 ("The Subcontracting Outreach Program was used for convention center"), 100 ("Q: "There's a listing of the forms that you reviewed ... for the bidders in this case? A: These were the same documents that were the Subcontracting Outreach Program, yes.").

The record now before the court also reflects that the very bid requirement document that specified the 35% SBE participation figure was headed in all capital letters: "SUBCONTRACTING OUTREACH PROGRAM SUMMARY/CONVENTION CENTER PROJECT." *See, e.g.*, Small depo. ex. 5; Butler depo. ex. 1, tab 4, p.7. That document continued, in part: "SBE GOALS PER TRADE CONTRACT ..., BID PACKAGE C: All bidders are required to meet the goal stated .... Drywall .... 35%." The Outreach Program Summary also stated that the "SBE bidder must clearly indicate on Form 2003 the percentage of work that represents their SBE participation percentage as a Prime related to the completion of the scope of work."

Substantial evidence in the record suggests, too, that the City treated that 35% figure as a mandatory requirement. *See, e.g,* Townsend depo. at 83 ("You're determined not to be in compliance if you did not meet the goal, yes"), 106. Indeed, the City bases its Motion with respect to Cleveland's equal protection claims on the assertion that the SBE goal was mandatory, although Cleveland takes somewhat of a contrary posltaon, *cf.* Cleveland's Reply Memo in support of MSJ at 2, citing prior Townsend testimony. Whereas the rest of the Code relating to SBE matters speaks in terms of goals not

expressed as inflexible threshold requirements, the Subcontracting Outreach Program as referenced in 321-37 and 323-31 "requires bidders to ... achieve a minimum of 20% (which may [be] higher for construction of buildings) SBE subcontractor participation." December 17, 2002 Griffin & Strong Report 7 (noting elsewhere that City can waive requirement in advance under the program). Significantly, at the same time that the Code was amended to include the Subcontracting Outreach Program language (including the cost cap), Council also deleted Code language otherwise requiring bidders to submit (less rigorous) "written assurance of commercially useful SBE participation in their bids" and to make "good faith" efforts to meet SBE participation levels. *See* former Code sections 323-27 and 323-29, as repealed by the same ordinance that established 232-31 incorporating the more mandatory regime of the Griffin & Strong report.

That mandatory approach also is largely consistent with the "Subcontracting Outreach Program" section of the Small Business Enterprise Program Rules and Guidelines that, although not signed by the City Manager, nonetheless provided guidance to City employees in certain respects. *See, e.g.*, Townsend depo. ex. 19 ("Rules and Guidelines") at 9 ("Subcontracting Outreach Program, CMC 323-31: The Subcontracting Outreach Program applies to City-funded construction contracts of $100,000 or more. At the City's sole discretion, these requirements may be waived in advance .... The Subcontracting Outreach Program requires bidders to ... achieve a minimum of 20% [which may be higher for construction of buildings] SBE subcontractor participation. To be eligible for award of this project, the SBE bidder must subcontract a minimum percentage of its bid to ... SBE subcontractors"); *see also* Lemmie depo. at 11 ("Rules and Guidelines" were "working documents used by staff in the office"); Ranford depo. at 78, 80 and ex. 34 and G ("Rules

and Guidelines" page 10, Subcontracting Outreach Program with regard to coverage of projects over $100,000 and mandatory nature of SBE figures was used for contract compliance review in convention center program, whereas Nondiscrimination MBE sections of Rules and Guidelines were not). The court observes, however, that Cleveland's position that "the City has ... decided that good faith efforts [to achieve SBE compliance] do not matter and does not look at them," Cleveland's MSJ Memo at 33, argues that certain elements of the Subcontracting Outreach section of the Rules and Guidelines were disregarded in pursuit of higher SBE figures, *see* Ranford depo. ex. G at 11 (good faith exceptions).

The City Manager's failure formally to promulgate rules and regulations for the Subcontracting Outreach Program under 323-37, of course, can provide no justification for any failure to abide by the $50,000/10% cost cap established by 321-37. Code 323-31 *requires* the issuance of such rules: "The City Manager *shall issue* roles and regulations to carry out the meaning and purpose of the Subcontracting Outreach Program...." Failure to provide required regulations may compound an abuse of discretion; it does not mitigate such an abuse. *See, e.g., City of Dayton, ex rel. Scandrick v. McGee,* 67 Ohio St.2d 356, 360 (1981) ("The presence of standards against which such discretion may be tested is essential; otherwise, the term 'abuse of discretion' would be meaningless"); *cf.* Lemmie depo. at 11 ("[a]t this time we have no plans" to issue any SBE rules and regulations other than those cited above as "working documents used by staff.").

Similarly, the City's perhaps unusual approach to legislative drafting - codifying the Subcontractor Outreach Program through statutory references to a consultant's report,

rather than by direct recitation of standards and requirements - cannot permit the City to ignore the cost cap that Council did specifically enact in 321-37. Had the legislative recommendations concerning the Subcontractor Outreach Program as set forth in Part II, Section I of the Griffin & Strong report referenced in 323-31 been adopted in a more straightforward fashion, the connection between the Subcontractor Outreach Program and a generally required SBE figure of 20% or higher would be more publicly visible. That connection is not nullified simply because it may be obscured by the indirect approach of the Code.

Code section 321-37(c)(4) envisions that "[i]nformation concerning compliance" with the SBE Subcontracting Outreach Program may be the primary basis for the selection of the lowest and best bidder (in which event, the cost cap applies). Defendants do not dispute that award of the contract to Valley was "based primarily" on "compliance" with the 35% SBE figure set forth in the SUBCONTRACTING OUTREACH PROGRAM SUMMARY. *See, e.g.*, Franklin depo. at 28-29 ("Q: ... do you remember any factor other than SBE compliance that was a primary factor in deciding who got the bid award in this situation? A: No. ....Q: ... do you recall there being any factor that made a difference primarily one way or the other other than the SBE number? A: No."). Although the title of that bid requirements document may not be dispositive, it does not appear to weigh in Defendants' favor.

Defendants plainly have not established that they are entitled to summary judgment on Cleveland's due process claim or on the remaining elements of Cleveland's Amended Complaint.

The closer issue is whether Cleveland is entitled to judgment on the due process portion of its motion. When the evidence is reviewed in the light most favorable to Defendants, as the summary judgment standard requires for this evaluation, the court cannot find that reasonable minds could come only to the conclusion that Cleveland had been divested of a property right in violation of due process of law. A question remains for the finder of fact as to whether the City legitimately designated Valley as the lowest and best bidder based on factors other than information concerning compliance with the Subcontracting Outreach Program. That is, an arguable question of fact remains as to whether the 35% SBE figure invoked by the City derived from the Subcontracting Outreach Program itself (with its generally mandatory 20% SBE threshold) or from efforts by the City on top of the Subcontractor Outreach Program to approach the overall 30% SBE goal contained elsewhere in the Code.

The City's 30% SBE goal was created prior to the Subcontractor Outreach Program and continues in effect today in a Code section separate from that containing the Subcontractor Outreach Program. Code 323-7 ("The city of Cincinnati's Annual Goal for SBE participation shall be 30% of the city's total dollars spent for construction ..."). The parties have not specifically identified in their briefing the particular genesis of the 35% drywall SBE figure that was used for Convention Center bids, and the court does not find the facts on that matter established beyond peradventure. That the Subcontracting Outreach Program applies to contracts over $100,000 and generally requires at least 20% SBE participation need not necessarily mean to a finder of fact that the higher goal of 30% SBE participation stated elsewhere in the Code could not have provided a sufficiently distinct basis for the City's evaluation.

The facts do make clear that the City insisted upon a re-bid after the initial bidding round in which Valley came very close to but did not meet the 35% figure (while very considerably exceeding the 20% level designated by the Subcontracting Outreach Program); in the end, Valley achieved 40% SBE participation to Cleveland's 10% -- a difference of 400%. The record also includes testimony that the Convention Center project is the only recent City project for which SBE goals were set at higher than the 20% Subcontractor Outreach figure. *See* Ranford depo. at 84.

The City has broad discretion to determine what constitutes the lowest and best bid. *See* 321-37; 321-65 (award to the "most advantageous" offeror, "taking into consideration price and evaluation factors set forth in the request for proposals"; here the contract was awarded on "lowest and best" basis); *cf. Cedar Bay Construction,* 50 Ohio St.3d at 21. Construing all the facts in the light most favorable to the Defendants for summary judgment purposes, the court determines that a reasonable finder of fact could decide that the cost cap provision is not triggered because the City arrived at its award for reasons substantially enough beyond the Subcontracting Outreach Program as to make "information concerning compliance" with that program something less than the primary basis for the award. That is an issue for trial next month.

The court therefore denies all motions for summary judgment in this matter.

Cleveland's Motion for Injunctive Relief

The court at this time will deny Cleveland's motion for injunctive relief pending trial. The parties' desires with regard to the scheduling of this case have been solicited on a regular basis. After the action was removed to and returned from federal court, Cleveland opted not to seek a prompt hearing on preliminary injunction, but sought rather to engage in the extended discovery reflected in the voluminous materials relating to the summary judgment motions. Cleveland then waited to the final day of the dispositive motion period -- almost one year after the action was filed and roughly three months prior to the scheduled June 20, 2005 trial date—to pursue its preliminary injunction request.

Moreover, Cleveland has provided no evidence whatsoever to meet its burden of proving (by clear and convincing evidence) various elements required to win injunctive relief. For example, the court has been presented with no evidence, apart from the McKillip affidavit provided by the City, as to the current status of the Convention Center drywall project, the equitable balance of harms among the parties, and important factors affecting the public interest. The trial date now is not much more than one month away; the evidence adduced there surely will help inform any decisions with regard to injunctive relief. The court in the exercise of its equitable powers will await that necessary information as presented by the parties in an orderly manner at trial.

SO ORDERED

/s/ _____
Fred Nelson,
Judge

cc: Kelly Lundrigan, 225 West Court Street, Cincinnati, OH 45202 (fax: 721-4268)

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APPENDIX O

COMMON PLEAS COURT
HAMILTON COUNTY, OHIO

CASE NO: A0402638

[Filed February 25, 2005]

Cleveland Construction, Plaintiff,	)
v.	)
City of Cincinnati, et al., Defendants.	)

ENTRY ON CITY'S MOTION FOR A PROTECTIVE ORDER

After a hearing was held in Chambers, Defendant City's Motion for a Protective Order is denied in that the City through counsel and Plaintiff's counsel will draft an agreed order proposing the terms and conditions under which the Darraugh Butler database will be provided to Plaintiff's counsel solely for use in this action. The City's motion regarding SBE files not related to the convention center project is moot, as Plaintiff withdraws its request for such documents.

/s/_____
Judge Fred Nelson

/s/ W. Kelly Lundrigan Attorney	0059211 Atty for Plaintiff
/s/Christopher J. Aluotto Attorney	0059556 Attny for City of Cincinnati
/s/David L. Barth	0025169 Atty for Valley Interior Systems, Inc.

APPENDIX P

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

CASE NO: A0402638

[Filed June 16, 2004]

Cleveland Construction, Inc., Plaintiff,	)
v.	)
City of Cincinnati, et al., Defendants.	)

ENTRY DENYING PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER

This matter, having come before the Court for a hearing on Plaintiff's Motion for Temporary Restraining Order on March 31, 2004, and the Court being fully advised and having heard arguments as to the merits therein, this Court hereby **DENIES** Plaintiff's Motion.

IT IS SO ORDERED.

/s/
Hon. Frederick D. Nelson, Judge

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No. 07-113

In the Supreme Court of the United States

CITY OF CINCINNATI,
Petitioner,

v.

CLEVELAND CONSTRUCTION, INC.,
Respondent.

On Petition for a Writ of Certiorari to the Ohio Court of Appeals, First Appellate District

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

There are no parties to the proceedings other than those listed in the caption. Respondent, Cleveland Construction Company, Inc., has no parent corporation and no publicly-held company owns 10% or more of its stock.

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BRIEF IN OPPOSITION

SUMMARY OF REASONS TO DENY THE PETITION

Petitioner City of Cincinnati (the "City") has invoked 28 U.S.C. §1257 as the basis for this Court's appellate jurisdiction. However, this Court does not have jurisdiction because there is no final appealable judgment. As a result, this Petition is not ripe for review.

On December 8, 2006, the Court of Appeals for the First Appellate District, Hamilton County, Ohio ("First District Court of Appeals") rendered a judgment finding that the City's Small Business Enterprise program ("SBE Program") indisputably encouraged and pressured bidders for public contracts to discriminate on the basis of race and gender and was subject to heightened scrutiny. The City submitted a petition for writ of certiorari to the Supreme Court of Ohio on five issues, including the First District Court of Appeals' finding that the City had violated Respondent Cleveland Construction's ("Cleveland") 14th Amendment equal protection rights.

The Supreme Court of Ohio accepted two issues for review. The first issue involves whether a disappointed bidder can have a constitutionally-protected property interest in a publicly bid contract to which due process protections apply. The second issue involves whether a disappointed bidder may recover damages under 42 U.S.C. §1983 for a constitutional violation where state law would deny a damages remedy to such a bidder. Obviously, both issues present significant federal law and constitutional issues. The Supreme Court of Ohio denied discretionary review of the equal protection issue that the City has prematurely presented to this Court. The appeal to the Supreme Court of Ohio is pending.

While there are four exceptions to the firmly established final judgment rule which permit the invocation of this Court's appellate jurisdiction despite the fact that proceedings are still ongoing in the state courts, none of those four apply to this case. The two issues currently being considered by the Supreme Court of Ohio are of such federal and constitutional relevance that they will likely be appealed to this Court, presenting the potential for piecemeal review.

If this Court determines that the case is ripe for review, the Petition still must be denied. The City has mischaracterized its SBE Program as a "discretionary, non mandatory municipal outreach/tracking program."[1] In reality, the SBE Program is infused with race and gender-conscious provisions. The City conceded that it lacked a proper evidentiary basis to establish any compelling interest in remedying past discrimination.[2] The decisions of the trial court and the First District Court of Appeals are soundly supported by the facts and are consistent with prevailing jurisprudence, including that of this Court.

The Court should therefore deny the City of Cincinnati's Petition because this case does not qualify for, or merit, review.

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[1] Petitioner's Br. at 17, *et seq.*

[2] Petitioner's Br. at 12.

STATEMENT OF THE CASE

A. The Current Controversy

In response to a solicitation of bids, Cleveland Construction submitted the lowest bid for the drywall work in the City of Cincinnati's Convention Center Expansion and Renovation Project. The City conceded that Cleveland's bid fully complied with all bid requirements, except for the fact that Cleveland did not subcontract out at least thirty-five percent of its work to small business enterprises ("SBEs"), as required by the SBE Program's Subcontracting Outreach Program. The City awarded the contract to the second lowest bidder, whose bid was more than $1.2 million higher than Cleveland's.

Cleveland sued and claimed, among other things, that the City's SBE Program was unconstitutional because it encouraged and pressured contractors to subcontract with minority and female-owned firms. As part of the bid documents, the City informed bidders that they "should be able to include minority and female firms at the level of availability"[3] as determined by the City. For the drywall contract, the City calculated the minority business enterprise ("MBE") availability to be 13.09 percent and the women's business enterprise ("WBE") availability at 1.05 percent. The SBE Program required all bidders to document their efforts to meet the availability estimate for MBEs and WBEs and cautioned all bidders that if they "failed to achieve levels of minority or women business enterprise participation as might be reasonable on the basis of objective data regarding availability and capacity of such businesses, the bidder shall

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[3] App. 2b.

be subject to an inquiry by the Office of Contract Compliance."[4]

B. The City of Cincinnati's Small Business Enterprise Program

In 1999, the City adopted the SBE Program to replace its Equal Business Opportunity Program. The Equal Business Opportunity Program included a minority set aside and was struck down as unconstitutional because the City lacked evidentiary findings that would justify a race conscious program.

The SBE Program's purpose, but not its substance, is set forth in Chapter 323 of the Cincinnati Municipal Code ("CMC"). CMC §323-7, entitled "Program Goals," explicitly states that the SBE Program contains a specific participation goal for MBEs and for WBEs, in addition to an overall participation goal for small businesses. CMC §323-7 designates a 30% participation goal for small business enterprises for construction supplies, services, and professional services. It also establishes MBE and WBE annual participation goals of 30% construction, 15% supplies/services, and 10% professional service. To carry out the meaning and purpose of the SBE Program, CMC §323-7 empowered the City Manager to issue and enforce rules and regulations.

The SBE Program's Rules and Guidelines provided the substance of the SBE Program requirements that applied to bidders on the Convention Center Project, and which both the trial court and the First District Court of Appeals found

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[4] App. 10b.

indisputably encouraged and pressured Cleveland to discriminate on the basis of race and gender in violation of Cleveland's 14th Amendment equal protection rights. The City did not include any of the provisions of the Rules and Guidelines in its Petition nor did it discuss any of the parts of the SBE Program declared unconstitutional by the lower courts.

In 2002, as the City prepared to renovate and expand the Cincinnati Convention Center, City Council hired a consultant to conduct a disparity study to determine if the City had the factual predicate that would enable it to reconfigure its SBE Program to be race or gender-conscious. After conducting the disparity study, the consultant determined that it did not. The consultant presented the results of his disparity study, as well as proposed revisions to the SBE Program, to City Council. Under political pressure from the Vice Mayor to make the program more aggressive, and more likely to induce contractors to subcontract with MBEs and WBEs on City projects, the consultant developed a "Non-Discrimination Program" and a "Subcontracting Outreach Program" to incorporate into the SBE Program. These revisions were ultimately adopted by City Council and codified in CMC Chapter 323 by reference.

The Subcontracting Outreach Program ("SOP") is contained in CMC §323-31 and is a subset of the SBE Program. The SOP applies to all City-funded construction contracts of $100,000 or more and requires bidders to make a good faith effort to subcontract a pre-determined percentage of its work to small, minority and women-owned businesses.[5] It is undisputed that Cleveland's failure to meet these

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[5] App. 12b-13b.

subcontracting percentages as part of the SBE Program for the Convention Center Project was the basis upon which the City awarded the contract to a bidder who was 1.2 Million Dollars higher in price, but who met the SBE percentages for the project.

C. The SBE Rules and Guidelines

The SBE Program's Rules and Guidelines promulgated by the City pursuant to CMC §323-31 explicitly state that the purpose of the SBE program is:

> to *ensure* that all bidders, vendors, and contractors . . . doing business with the City provide to businesses owned and controlled by racial minorities and ethnic minorities and women, opportunities to participate, *to the extent of their availability*, on contracts which are paid in whole or in part with monetary appropriations from the City of Cincinnati.[6]

The Rules and Guidelines are rife with additional race and gender-conscious provisions, none of which were discussed or acknowledged in the City's Petition, including the following:

> * "In order to be considered as responsive, all bidders/proposers are required to use good faith efforts to promote opportunities for Minority and Women Business Enterprises to participate in and compete for, *to the extent of their availability*, contracting, subcontracting, and purchasing opportunities. Prior to the award of any contract

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[6] App. 7b (emphasis added).

related to construction services or professional services, the City *shall* evaluate each bidder's *documented efforts* to achieve participation of minority and women business enterprise firms."[7]

* "Upon its successful implementation, the Non-Discrimination Program [a component of the SBE Program] will result in utilization of minority and women-owned firms *to the extent of their* [governmentally specified] *availability*... ."[8]

* "The City of Cincinnati, or its designated agent, will *evaluate* efforts made by bidders to promote opportunities for minority and women-owned firms (MBE/WBE) to compete for business as subcontractors and/or material or equipment suppliers at the time of bidding. ... If the *evaluation* determines that a bidder has *failed to achieve* levels of minority and women business enterprise participation as might be reasonable on the basis of objective data regarding *availability and capacity* of such business, the bidder *shall* be subject to an *inquiry* by the Office of Contract Compliance."[9]

* "Bidders or Offerors [operating under the Subcontracting Outreach Program] *should be able* to include the participation of minority and female firms

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[7] App. 8b-9b (emphasis added).

[8] App. 10b (emphasis added).

[9] App. 10b (emphasis added).

at the *levels of availability* determined in the City of Cincinnati Disparity Study."[10]

* "The SBDOCC [Small Business Division Office of Contract Compliance] will maintain a database to assist bidders in identifying minority and women business enterprises with capabilities commensurate with general contracting requirements. ... The list prepared from the database specifies which firms the City has determined to meet the requirements necessary for designation as minority and women business enterprises."[11]

* "Contractors *are required* to maintain documentation regarding the utilization of minority and women business enterprises, and all other pertinent records, during the performance of award of their contract."[12]

One of the most significant race and gender-conscious provisions contained in the Rules and Guidelines is the good faith effort requirement that bidders:

provide a *detailed description* of the techniques used to *obtain participation* of minority and women-owned business enterprises, including segmenting of the work into 2 or smaller units (areas for subcontracting), attending pre-bid conferences, soliciting specific minority and women-owned firms, soliciting trade

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[10] App. 13b (emphasis added).

[11] App. 11b.

[12] App. 11b (emphasis added).

> associations that focus on minority and women-owned businesses, advertising efforts, and other methods used.[13]

Further, "[b]idders are required to show that they've made a good faith effort to get the *maximum practical participation* of minority and women-owned businesses on this project."[14] To prove that the bidders made the requisite "good faith efforts" to solicit MBEs and WBEs, bidders were required to submit Form 2007 "Statement of Good Faith Efforts"[15] with their bids containing detailed descriptions of the techniques used to obtain the maximum practical participation of MBEs and WBEs. A failure to achieve participation by the estimated availability of MBEs and WBEs as calculated by the City, which for the drywall contract was 13.09% MBEs and 1.05% WBEs, would trigger an investigative inquiry. Specifically, the Rules and Guidelines state:

> If the bidder's utilization is the same as or greater than the actual availability percentage, then the city can accept the bidder's utilization as being in compliance with the program. *The burden is on the bidder to explain the low utilization percentage.* If the contract administrator determines that the contractor under-utilized minority and/or women-owned businesses based on the actual availability percentage, and that the bidder's good faith efforts were inadequate and there is no legitimate explanation for the under-

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[13] App. 15b (emphasis added).

[14] App. 18b (emphasis added).

[15] App. 35b-36b.

> utilization, then *the matter is turned over to the investigative unit for a discrimination investigation.*[16]

The discrimination investigation could involve local, state, or federal agencies charged with investigating and resolving civil rights violations or enforcing laws relating to discriminatory treatment. Those accused of discrimination must defend themselves against each allegation with specificity and particularity.[17]

D. The Bid Documents

While the Rules and Guidelines contain explicit race and gender-based preferences, the bid documents circulated to bidders for the convention center project, including Cleveland, did as well. The bid package included a Subcontracting Outreach Program Summary.[18] The Summary listed the SBE goals per trade contract, which for the drywall contract was 35%.[19] Bidders also received an "Availability Estimation Sheet" listing the availability percentage for MBEs and WBEs for each project. Bidders were told that they "*should be able* to include minority and female firms at the level of availability indicated."[20] The availability estimate for the drywall project listed MBE availability at 13.09% and

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[16] App. 15b (emphasis added).

[17] App. 19b-25b.

[18] App. 2b-5b.

[19] App. 3b.

[20] App. 2b (emphasis added).

Item Description: CINCINNATI CONVENTION CENTER
EXPANSION AND RENOVATION
Date Issued: December 23, 2003

AVAILABILITY ESTIMATION SHEET

VAILABILITY ESTIMATION - Subcontractor Outreach Program (CMC 323-31)

The preliminary availability estimate for this project is:

The preliminary availability estimate for this project is:

Commodity Code 099-01	Description TC-01B General Trades	11.26 % Minority	3.97 % Female
Commodity Code 099-01-01	Description TC-01C Interior Remediation	13.09 % Minority	1.05 % Female
Commodity Code 099-01	Description TC-02E Temporary Conditions	11.26 % Minority	3.97 % Female
Commodity Code 099-01	Description TC-02F Selective Demolition	11.26 % Minority	3.97 % Female
Commodity Code 099-01-01	Description TC-04A Masonry	13.09 % Minority	1.05 % Female
Commodity Code 099-01-01	Description TC-06A Millwork	13.09 % Minority	1.05 % Female
Commodity Code 099-01-01	Description TC-08A Doors, Frames & Hardware	13.09% Minority	1.05 % Female
Commodity Code 150-55	Description TC-08B Overhead Doors	25.0 % Minority	0.00 % Female
Commodity Code 099-01-01	Description TC-09A Drywall	13.09 % Minority	1.05 % Female
Commodity Code 910-09	Description TC-09C Soft Floors	13.33 % Minority	0.00 % Female
Commodity Code 099-01	Description TC-10A Specialties	11.26 % Minority	3.97 % Female
Commodity Code 165-00	Description TC-11A Food Service Equipment	6.90 % Minority	0.00 % Female
Commodity Code 099-09	Description TC-14A Elevators & Escalators	21.43 % Minority	0.00 % Female
Commodity Code 099-07	Description TC-15B HVAC	14.29 % Minority	1.59 % Female
Commodity Code 099-05	Description TC-15C Plumbing	16.07 % Minority	0.00 % Female
Commodity Code 099-03-01	Description TC-15D Fire Protection	19.23 % Minority	5.77 % Female
Commodity Code 099-03	Description TC-16A Electrical	18.42 % Minority	7.89 % Female
Commodity Code 099-03	Description TC-16B Low Voltage Electrical	18.42 % Minority	7.89 % Female

VOLUME 1 - BID DOCUMENT - As part of the bid submission, the bidder must return Volume 1 - Bid Document with all pages intact, along with two (2) photocopies of all pages included in Volume 1.

Failure to return the original Volume 1 and two (2) photocopies of Volume 1 may result in rejection of the bid. Removal of any pages included in the original and photocopies of Volume 1 may result in rejection of the bid.

WBE availability at 1.05%.[21] Page two of the Legal Notice directly following the Availability Estimation states in item (b) that, "Failure of a bidder to comply with these requirements (Equal Employment Opportunity and Small Business Enterprise Program) at the time of the bid may be cause for rejection of the bid."[22]

Bidders also received a "Subcontractor Utilization Plan" requiring them to identify the ownership status of each subcontractor, specifically total MBE, total WBE, total SBE, and total White percentages,[23] a "Covenant of Non-Discrimination Policy,"[24] and a "Solicitation Certification Form" which detailed solicitations made by the bidder to subcontractors and required them to indicate the type of ownership of each.[25]

E. The Cincinnati Convention Center Project

On December 23, 2003, the City issued an invitation to bid on the drywall portion of the Cincinnati Convention Center project. Cleveland was the lowest bidder in the initial round of bidding. However, all bids were rejected because none of the bidders met the 35% SBE participation goal for the drywall portion of the convention center project. The City conducted an emergency re-bid, in which Cleveland was

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[21] App. 1b.

[22] App. 44b.

[23] App. 31b.

[24] App. 26b-27b.

[25] App. 28b.

again the lowest bidder. However, its bid only contained 10% SBE participation, whereas a competitor, Valley Interior Systems, Inc. ("Valley"), achieved 40% SBE subcontractor participation, all of which were MBEs and/or WBEs. Although its bid exceeded Cleveland's by $1,246,022, the City awarded the drywall contract to Valley solely because it met the SBE participation goal. The City acknowledged that Cleveland's bid was acceptable in all other respects and it was otherwise qualified and able to perform the work.[26] On March 30, 2004, Cleveland brought an action against the City for, among other things, violating its 14th Amendment equal protection rights through the imposition and application of its SBE Program.

F. Proceedings Below

After a trial on the merits, the trial court found that the SBE Program Rules and Guidelines created race and gender-based classifications and were unconstitutional on their face and as applied.[27] The trial court stated that in the process of soliciting bids for the drywall contract, the City pressured and encouraged bidders, including Cleveland, to draw upon race and sex-based classifications that the City concedes could not withstand the requisite heightened standard of review. Specifically, the trial court found that eight provisions of the SBE Program's Rules and Guidelines indisputably pressured and encouraged contractors to recruit and utilize subcontractors based on race and/or gender in violation of Cleveland's rights under 42 U.S.C. §1983.[28] The trial court

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[26] Petitioner's App. 18a.

[27] Petitioner's App. 53a, *et seq.*

[28] Petitioner's App. 66a-69a.

found in favor of Cleveland and permanently enjoined the City from applying the race and gender-based classifications in the Rules and Guidelines absent a formal determination that a race-based program was narrowly tailored to fulfill a compelling governmental interest or that a gender-based program was substantially related to genuine and important governmental interests.[29]

Both Cleveland and the City appealed to the First District Court of Appeals. The City argued, among others, that the trial court erred by concluding that the SBE Program contained impermissible race and gender-based classifications, contending, as it does here, that the program was a lawful outreach program that merely encouraged contractors to use good faith efforts to provide subcontracting opportunities for MBEs and WBEs. However, the First District Court of Appeals affirmed the decision of the trial court, concluding:

> Where the city's SBE Program required documentation of a bidder's specific efforts to achieve the participation of minority subcontractors to the extent of their availability as predetermined by the city, the program undeniably pressured bidders to implement racial preferences. Therefore, the program's rules must be subject to strict scrutiny.[30]

It also found that to the extent that the City's program pressured bidders to hire women-owned subcontractors, the City was required to demonstrate an exceedingly persuasive

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[29] Petitioner's App. 41a-45a.

[30] Petitioner's App. 25a.

justification.[31] The City conceded that it could not withstand either level of heightened scrutiny.[32]

The City filed a notice of appeal and a memorandum in support of jurisdiction with the Supreme Court of Ohio. Among its five issues presented for review was a challenge to the determinations that the SBE program contained race and gender-based preferences and was subject to heightened scrutiny. The Supreme Court of Ohio declined to exercise jurisdiction over this issue. However, it did exercise jurisdiction over two other issues presented for review, both of which present significant federal law and constitutional questions and are still pending.[33]

REASONS FOR DENYING THE PETITION

I. This Court Has No Jurisdiction Under 28 U.S.C. §1257 To Grant this Petition Because There Has Not Been a Final Appealable Judgment

This Court may not exercise appellate jurisdiction except as explicitly permitted by Congress.[34] In its Petition, the City

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[31] Petitioner's App. 25a-26a.

[32] Petitioner's App. 26a.

[33] Petitioner's App. 1a-2a.

[34] *American Const. Co. v. Jacksonville, T. & K.W. Ry.*, 148 U.S. 372, 378 (1893) ("This court, therefore, as it has always held, can exercise no appellate jurisdiction, except in the cases, and in the manner and form, defined and prescribed by congress.").

premises this Court's jurisdiction on 28 U.S.C. §1257(a), which states:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

28 U.S.C. §1257 grants to this Court jurisdiction only over appeals in which there has been a final judgment. This Court has explained that:

> This provision establishes a *firm final judgment rule*. To be reviewable by this Court, a state-court judgment must be final 'in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court.' *Market Street R. Co. v. Railroad Comm'n of Cal.*, 324 U.S. 548, 551, 65 S.Ct. 770, 773, 89 L.Ed. 1171 (1945). As we have recognized, the finality rule 'is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system.'

Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 124, 65 S.Ct. 1475, 1478, 89 L.Ed. 569 (1945).[35]

This Court elaborated, "in general, the final judgment rule has been interpreted 'to preclude reviewability . . . where anything further remains to be determined by a state court, no matter how dissociated from the only federal issue that has finally been adjudicated by the highest court of the state.'"[36] There is no final judgment even if all that remains to be decided are "a few loose ends."[37]

While an order from the highest court of the State, in this case, the Supreme Court of Ohio, denying discretionary review is a final judgment that may be appealed to this Court, the Supreme Court of Ohio granted discretionary review of two of the five issues presented by the City and both issues involve significant federal questions. Specifically, the Supreme Court of Ohio accepted for review 1) whether, under Cincinnati's specific public bidding laws, a disappointed bidder for a City contract may have a constitutionally

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[35] *Jefferson v. City of Tarrant, Ala.*, 522 U.S. 75, 80-81 (1997) (emphasis added).

[36] *Flynt v. Ohio*, 451 U.S. 619, 620 (1981) (quoting *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945)).

[37] *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62 (1948) (citing *Bruce v. Tobin*, 245 U.S. 18 (1917); *Martinez v. International Banking Corp.*, 220 U.S. 214, 223 (1911); *Mississippi Central R. Co. v. Smith*, 295 U.S. 718 (1935)) ("Thus, the requirement of finality has not been met merely because the major issues in a case have been decided and only a few loose ends remain to be tied up-for example, where liability has been determined and all that needs to be adjudicated is the amount of damages.").

protected property interest in that contract and 2) whether a disappointed bidder may recover lost profit damages in a 42 U.S.C. §1983 action upon proving a constitutional violation.

Thus, while the Supreme Court of Ohio denied discretionary review of the equal protection issue now presented to this Court, there are still ongoing proceedings in the Supreme Court of Ohio involving significant federal constitutional questions that are likely to be appealed to this Court at a later date. Therefore, there has not been a "final judgment" within the meaning of 28 U.S.C. §1257.

Jurisdictional statutes like 28 U.S.C. §1257 must be strictly construed so as to give effect to the wishes of Congress.[38] Strictly construing 28 U.S.C. §1257 so as to give effect to the wishes of Congress leads to the definitive conclusion that this Petition is not ripe for review and this Court does not have jurisdiction.

While there is a firm final judgment rule, there are four narrow exceptions articulated in *Cox Broadcasting Corp. v. Cohn*.[39] However, none of these exceptions apply here.

The first exception involves cases in which there are further proceedings in the state courts but where the federal issue is conclusive or the outcome of further proceedings is preordained.[40] That is not the case here as the federal constitutional issue of whether Cleveland's constitutional due process rights have been violated by deprivation of the

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[38] *Palmore v United States*, 411 U.S. 389, 396 (1973).

[39] 420 U.S. 469 (1975).

[40] *Id.* at 479.

contract, and whether Cleveland is legally entitled pursuant to 42 U.S.C. §1983 to seek damages in the form of lost profits, has not and will not be conclusively determined by the outcome of any decision by the Supreme Court of Ohio. In the event of an unfavorable decision in the Supreme Court of Ohio, Cleveland could, and would, seek review by this Court. The outcome of the proceedings remaining in the Supreme Court of Ohio is not preordained but remains uncertain. This first exception simply does not apply.

The second exception applies to cases in which the federal issue, finally decided by the highest court in the state, will survive and require decision regardless of the outcome of future state court proceedings.[41] While this would seem to apply to the issue presented in the Petition, there is a qualification that there may not be other issues pending below that could also require review by this Court at a later date.[42] This caveat prevents piecemeal review:

> We observed in *Cox* that in most, if not all, of the cases falling within the four exceptions, not only was there a final judgment on the federal issue for purposes of state-court proceedings, but also there were *no other federal issues* to be resolved. There was thus no probability of piecemeal review with respect to federal issues.[43]

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[41] *Id.* at 480.

[42] *Id.* at 477 ("in most, if not all, of the cases in these categories [exceptions to final judgment rule], these additional proceedings [in state court] would not require the decision of other federal questions that might also require review by the Court at a later date . . .")

[43] *Flynt v. Ohio*, *supra* note 36, at 621 (emphasis added).

Similarly, in *Florida v. Thomas*, this Court reiterated that:

> We have also noted that we treat state-court judgments in this category [the second exception] as final on the assumption that "the federal questions that could come here have been adjudicated by the State court," and the state proceedings to take place on remand "could not remotely give rise to a federal question . . . that may later come here."[44]

The two issues currently on appeal to the Supreme Court of Ohio are significant federal issues that could be appealed to this Court at a future date. Thus, this second exception to the final judgment rule does not apply.

The third exception involves situations where the federal claim has been finally adjudicated and there are further proceedings in state court on the merits, but in which later review of the federal issue cannot be had, regardless of the outcome of the case.[45] This exception does not apply to the case at bar because there is no impediment to this Court's consideration of the issue presented in this Petition at a later date.

The fourth and final exception involves those situations where the federal issue has been finally decided at the state court level and further proceedings are pending in which the party seeking review might prevail on the merits on nonfederal grounds, rendering unnecessary review of the federal issue by this Court, and where reversal of the state

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[44] 532 U.S. 774, 778 (2001).

[45] *Cox Broadcasting Corp. v. Cohn*, *supra* note 39, at 481.

court on the federal issue would preclude further litigation on the relevant cause of action rather than merely controlling the nature and character of the proceedings still to come.[46] This does not apply to the issue presented in the Petition because the issues pending in the Supreme Court of Ohio are federal issues and reversal of the state court on the issue presented in the Petition would not affect the outstanding issues in state court.

This Court must deny the Petition because it does not have appellate jurisdiction over this case pursuant to 28 U.S.C. §1257.

II. The Petition Should be Denied Because the Lower Courts' Decisions are in Harmony with Long Standing Jurisprudence that Government Programs that Encourage and Pressure Discrimination Based on Race are Subject to Strict Scrutiny

A. Petitioner's Characterization of its SBE Program is not Controlling

Despite Petitioner's characterization of its SBE program as a mere outreach or tracking program, the trial court and the First District Court of Appeals correctly found that the SBE Program is race and gender-conscious and cannot withstand heightened scrutiny. While the City describes its program as a "discretionary, non-mandatory municipal outreach/tracking program designed to promote equal opportunities for minority-owned and women-owned

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[46] *Id.* at 482.

businesses,"[47] the City completely ignores the provisions the lower courts found objectionable and which Cleveland cited previously herein. The City's characterization of its SBE Program is not controlling for the purposes of determining whether it contains race or gender-based classifications triggering heightened scrutiny. This is amply supported by prevailing jurisprudence.

As the Ninth Circuit opined, a program like the City's SBE Program is, "not immunized from scrutiny because [it] purports to establish 'goals' rather than 'quotas.' We look to the economic realities of the program rather than to the label attached to it."[48] The Sixth Circuit agreed, finding that, "although explicit racial preferences must withstand strict scrutiny, the government may not avoid searching review merely by invoking the phrase 'good-faith effort to solicit.'"[49] Further, the Sixth Circuit noted that, "where 'outreach' requirements operate as a sub rosa racial preference-that is, where their administration 'indisputably pressures' contractors to hire minority subcontractors-courts must apply strict scrutiny."[50]

While the City has attempted to mask the true character of its SBE Program by describing it as "outreach" or "for tracking purposes only," that does not change its true nature,

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[47] Petitioner's Br. at 17.

[48] *Bras v. California Public Util. Com'n*, 59 F.3d 869, 874 (9th Cir. 1995).

[49] *Safeco Ins. Co. of America v. City of White House, Tenn.*, 191 F.3d 675, 691 (6th Cir. 1999).

[50] *Id.* at 692.

which is a program designed to coerce contractors into subcontracting with MBEs and WBEs to the extent of their availability as calculated by the City or lose the contract and risk a discrimination investigation and sanctions.

B. The Lower Courts' Determinations that the City's SBE Program Encourages and Pressures Discrimination Based on Race, Triggering Strict Scrutiny, are Consistent with this Court's Decision in *Adarand Constructors v. Pena*

The findings of the trial court and the First District Court of Appeals that the SBE Program contained provisions that encourage and pressure bidders to discriminate on the basis of race, triggering heightened scrutiny, are consistent with this Court's decision in *Adarand Constructors v. Pena*.[51] In *Adarand,* a subcontractor that was not awarded the guardrail portion of a federal highway contract due to a compensation clause that provided financial incentives to a prime contractor in return for hiring disadvantaged subcontractors asserted violations of the Fifth Amendment's Equal Protection Clause. This Court held, "any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny."[52] The Court went on to say, "When race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the 'narrow tailoring' test this Court has set out in previous

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[51] 515 U.S. 200 (1995); see also *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003).

[52] *Adarand Constructors*, 515 U.S. at 223.

cases."[53] The Court ultimately held that to the extent regulations provide incentives to contractors to use race-based classifications, those regulations are subject to strict scrutiny.[54]

The City tries to differentiate its SBE Program from that at issue in *Adarand* by pointing out that whereas the challenged regulations in *Adarand* provided a financial incentive to bidders to grant a preference to disadvantaged subcontractors, that is not the case with the SBE Program. However, the City misstates this Court's holding. First, *Adarand* does not stand for the proposition that only programs providing financial incentives are subject to strict scrutiny. Rather, it stands for the general rule that any race-based classification resulting in disparate treatment, including financial or other incentives, is subject to strict judicial scrutiny. Second, the financial incentive is present in the City's SBE Program as well. The financial incentive is the ultimate award of the contract and the avoidance of a time-consuming discrimination investigation and possible sanctions. If bidders want to maximize their chances of winning a public contract, they must retain the maximum practical participation of MBEs and WBEs as subcontractors as calculated by the City. If they do not, they risk losing the contract entirely. This is a financial incentive to discriminate on the basis of race and, as dictated by *Adarand*, triggers strict scrutiny.

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[53] *Id.* at 237.

[54] *Id.* at 224.

C. The Lower Courts' Determinations that the City's SBE Program Encourages and Pressures Bidders to Discriminate Based on Race are Consistent with the Jurisprudence of other Federal Courts

In its Petition, the City attempts to argue that its SBE Program is merely an outreach or tracking program that does not encourage or pressure bidders to discriminate and thus is distinguishable from those programs ultimately held unconstitutional by other federal courts.[55] Again, however, in attempting to distinguish the City's SBE Program from those discussed in the cases, the City failed to discuss the specific provisions the lower courts found objectionable. A realistic examination of the City's SBE Program demonstrates that the trial court and First District Court of Appeals correctly found that where the City's program required documentation of a bidder's specific efforts to achieve participation of minority subcontractors to the extent of their availability as calculated by the City or risk a discrimination investigation and sanctions, the SBE Program was not a mere outreach program, but rather a program that undeniably pressured bidders to implement racial preferences and is thus subject to strict scrutiny.

In *Lutheran Church-Missouri Synod v. FCC,*[56] the United States Circuit Court for the District of Columbia found that indisputable pressure to discriminate on the basis of race, even if discrimination is not mandatory, is enough to trigger strict scrutiny. Citing *Adarand*, the court found that it was not

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[55] Petitioner's Br. at 17, *et seq.*

[56] 141 F.3d 344 (D.C. Cir. 1998), *reh'g en banc denied*, 154 F.3d 487 (D.C. Cir. 1998).

necessary that the racial preferences be mandatory to trigger strict scrutiny, stating "the Supreme Court treated the regulations as a racial classification and did not even pause to consider the suggestion that the absence of a compelled racial preference makes strict scrutiny inapposite."[57] Indisputable pressure, even if discrimination is not compelled, is sufficient.

While the discrimination in *Lutheran* was not mandatory, the City's stated policy underlying the SBE Program to provide MBEs opportunities to participate to the extent of their availability, by its plain language, is intended to ensure, not just suggest, that minorities be provided with opportunities sufficient to ensure their participation to the extent of their availability as calculated by the City. At the very least, the SBE Program indisputably pressures bidders to discriminate, if not compels them to do so.

In *Monterey Mechanical v. Wilson*,[58] the Ninth Circuit found that a statute requiring general contractors to subcontract specified percentages of work to minority, women, and disabled veteran-owned subcontractors, or to demonstrate good faith efforts to do so, triggered strict scrutiny. The court found that, "though worded in terms of goals and good faith, the statute imposes mandatory requirements with concreteness. The scheme requires the bid solicitation in the context of requiring 'good faith efforts to meet [percentage] goals.'"[59] The court ultimately found that "the statute does not require set-asides, but it encourages them. A bidder can avoid disqualification by seeing to it that

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[57] *Lutheran Church-Missouri Synod,* 154 F.3d at 491.

[58] 125 F.3d 702 (9th Cir. 1997).

[59] *Id.* at 711.

23% of the work goes to the designated classes, or showing that it tried to bring about that result." As such, the statute was race-conscious.

Similarly, the SBE Program contains a multitude of race-conscious provisions that encourage and pressure prime contractors to include a certain percentage of MBE and WBE subcontractor participation in their bids. The program provides benefits for those bidders who include MBEs at their estimated level of availability. Conversely, the program imposes burdens upon bidders who do not meet the subcontracting goals, or demonstrate good faith efforts to do so, including disqualification and potential investigations and sanctions to bidders who do not meet the specified MBE and WBE availability estimates.

And in *Safeco Insurance Company of America v. City of White House, Tennessee,*[60] the Sixth Circuit held that even if a regulation does not explicitly impose a specific numerical quota, but instead only requires "good faith efforts" to meet that goal, that alone would not insulate the regulation from strict scrutiny.[61] In that case, the Sixth Circuit found that the EPA's stated policy of awarding a "fair share" of sub-agreements to MBEs "implies that the outcome must meet an implicit goal – a goal derivable from one's calculation of 'fair share,' but almost certainly non-zero."[62]

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[60] 191 F.3d 675 (6th Cir. 1999).

[61] *Id.* at 689, 691.

[62] *Id.* at 690. See also *Bras v. Calif. Pub. Util. Comm.*, 59 F.3d 869 (9th Cir.1995) (Rigid mandates are not a prerequisite to finding a racial classification).

The same is true of the City's SBE Program. The Rules and Guidelines use the word "ensure" to indicate explicitly, or at least implicitly, that bidders are required to utilize MBEs and WBEs to the extent of their availability as calculated by the City. The fact that the City calculates MBE and WBE availability and then presents an "Availability Estimation" in the bid documents strongly implies that the City has established a goal that should be met and requires documentation of good faith efforts to meet that goal. As was the case with the challenged regulation in *Safeco*, a "good faith" requirement to meet those goals is enough to trigger strict scrutiny.

III. The Lower Courts' Decisions Are Consistent with this Court's Holding in *Parents Involved in Community Schools v. Seattle School District No. 1*

Petitioner asserts that this case should be reexamined in light of this Court's recent decision in *Parents Involved in Community Schools v. Seattle School District No. 1*[63] ("*Community Schools*"). However, the holding in *Community Schools*, in fact, supports Cleveland's position that the racially-conscious components of the SBE Program are subject to strict scrutiny. *Community Schools* reaffirmed that, "It is well established that when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny"[64] and that "this Court has recently reiterated, however, that '*all* racial classifications [imposed by government] ... must be

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[63] 127 S.Ct. 2738 (2007).

[64] *Id.* at 2751 (citing *Johnson v. California*, 543 U.S. 499, 505-506 (2005); *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003); *Adarand Constructors v. Pena*, 515 U.S. 200, 224 (1995)).

analyzed by a reviewing court under strict scrutiny.'"[65] The SBE Program distributes burdens and benefits on the basis of compliance with the race-conscious components of the Rules and Guidelines, namely the MBE and WBE availability estimates, and as such, the courts must apply strict scrutiny.

While the City cites Justice Kennedy's concurring opinion, which suggests that tracking the achievement of students from major racial and ethnic groups may not trigger strict scrutiny, as demonstrated by the Rules and Guidelines, the SBE Program is not merely a tracking program. *Community Schools* does not erode the reality that the City's SBE Program contains race-conscious provisions without the proper factual predicate to withstand strict scrutiny and, as such, is illegal.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

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[65] *Id.* at 2764 (quoting *Johnson v. California*, 543 U.S. 499, 505-506 (2005); citing *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003); *Adarand Constructors v. Pena*, 515 U.S. 200, 224 (1995)).

Respectfully submitted,

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APPENDIX A

CINCINNATI CONVENTION CENTER
EXPANSION AND RENOVATION
Date Issued: December 23, 2003

AVAILABILITY ESTIMATION SHEET

[Fold out Exhibit, next page]

APPENDIX B

City of Cincinnati

SUBCONTRACTING OUTREACH PROGRAM SUMMARY

CONVENTION CENTER PROJECT

All bidders must complete the forms in this section (with exception of Forms 2005, 2006 and 2008) in order for a bid to be considered responsive. Pay particular attention to the requirements of the Statement of Good Faith Outreach Efforts. Failure to submit any of the information indicated on these forms may cause a bid to be rejected as non-responsive.

It is in the City's best interest to ensure opportunities for all qualified and available SBEs. An SBE is defined by its net worth and number of employees or revenue size and can be a minority, women-owned or majority-owned business. You will also find on the cover of this bid document an Availability Determination. These figures are percentages based on a review of the City's vendors' list and certified minority and women-owned businesses. Businesses are identified based on the areas of work included in the specifications for this project. Bidders should be able to include minority and female firms at the level of availability indicated.

Bidders are required to show that they've made a good faith effort to get the participation of SBEs on this project. The goal for each Trade Contract is as defined in the contract

documents and may be different from the Availability Determination percentages. This goal is mandatory.

SBE GOALS PER TRADE CONTRACT CINCINNATI CONVENTION CENTER PROJECT, BID PACKAGE C

All bidders are required to meet the goal stated for the individual trade contract as specified in each bid document. Work being self performed by a Certified SBE bidding as a prime contractor may be counted toward meeting the SBE subcontracting utilization goal. The SBE bidder must clearly indicate on Form 2003 the percentage of work that represents their SBE participation percentage as a Prime related to the completion of the scope of work.

Failure to meet this goal may cause a bid to be rejected as non-responsive.

GOALS FOR BID PACKAGE C

TC-01B General Trades	**50%**
TC-01C Interior Remediation	**50%**
TC-02E Temporary Conditions	**50%**
TC-02F Selective Demolition	**35%**
TC-04A Masonry	**35%**
TC-06A Millwork	**20%**
TC-08A Doors, Frames & Hardware	**30%**
TC-08B Overhead Doors	**10%**
TC-09A Drywall	**35%**
TC-09C Soft Floors	**30%**
TC-10A Specialties	**50%**
TC-11A Food Service Equipment	**5%**
TC-14A Elevators & Escalators	**10%**
TC-15B HVAC	**35%**

TC-15C Plumbing	**35%**
TC-15D Fire Protection	**10%**
TC-16A Electrical	**35%**
TC-16B Low Voltage Electrical	**30%**

FORMS THAT MUST BE COMPLETED AND INCLUDED IN THE BID AT THE TIME OF SUBMITTAL

Form 2000 - Offeror's Covenant of Non-Discrimination Policy must be signed and dated.

Form 2001 - Solicitation Certification Form must be used to list all firms solicited for subcontract work

Form 2002 - Joint Venture Agreement Affidavit only if applicable and ***must be approved prior to bid submittal.***

Form 2003 - Subcontractor Utilization Plan lists ***all firms, SBE and Non-SBE*** that you plan to actually utilize on the project. For a list of certified Small Business Enterprises please view the website www.cincinnati-oh.gov or contact the Office of Contract Compliance at (513) 352-3144.

Form 2007 - Statement of Good Faith Efforts must be signed and included in the bid package.

FORMS THAT HAVE ALTERNATE SUBMITTAL TIMES

Form 2004 - Subcontractor Approval Request must be completed and submitted to the Contract Compliance Office within 48 hours of request. A form for all Subcontractors (SBE and non-SBE) must be submitted.

Form 2005 - Subcontractor Monthly Business Utilization Report must be submitted with the claim voucher before monthly payment will be made.

Form 2006 - Subcontractor Substitution all contractors must receive approval from the Office of Contract Compliance for any proposed change in subcontractors from those indicated on the contract prior to the start of work.

Form 2008 - Final Subcontracting Report must be submitted within 15 days after the final inspection of the contract work

If you have any questions or need assistance in meeting these requirements, please feel free to contact the Office of Contract Compliance at (513) 352-3144.

Last Revised 12/22/03

APPENDIX C

CITY OF CINCINNATI

SMALL BUSINESS DIVISION
OFFICE OF CONTRACT COMPLIANCE

Small Business Enterprise Program

RULES AND GUIDELINES

* * *

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necessary to carry out the City's commitment to effect maximum SBE participation in its procurement practices. The City of Cincinnati is committed to a policy of non-discrimination pursuant to Section 1 of the Fourteenth Amendment to the United States Constitution, which guarantees equal protection of the laws to all citizens. It is further the policy of the City of Cincinnati that its purchasing and contracting practices not implicate the City as a passive participant in discriminatory practices engaged in by private contractors or vendors who seek to obtain business with the City. In furtherance of these policy objectives, the City seeks to afford to its citizens equal opportumties to do business on City contracts and to ensure that all bidders, vendors and contractors (collectively referred to herein as "bidders") doing business with the City provide to businesses owned and controlled by racial minorities and ethnic minorities and women, opportunities to participate, to the extent of their availability, on contracts which are paid, in whole or in part, with monetary appropriations from the City of Cincinnati. It should be noted that the success of the SBEP is contingent upon the clarity of the policy, the clarity of the procedures used to implement and administer these policies, rules and guidelines, and the commitment of each City department.

In conclusion, this manual is designed to provide accurate and authoritative information regarding the subject matter. It is written with the understanding that the drafters are not engaged in rendering legal, accounting, or other professional

services. If legal advice or other expert assistance is required, the services of the Solicitor's Office, Finance Department and other professionals in the City family and outside the City family, should be sought.

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Non-Discrimination Program (CMC 321-159)

Non-Discrimination Policy

The City of Cincinnati is committed to a policy of non-discrimination pursuant to Section 1 of the Fourteenth Amendment to the United States Constitution, which guarantees equal protection of the laws to all citizens. It is further the policy of the City of Cincinnati that its purchasing and contracting practices not implicate the City as a passive participant in discriminatory practices engaged in by private contractors or vendors who seek to obtain business with the City. In furtherance of these policy objectives, the City seeks to afford to its citizens equal opportunities to do business on City contracts and to ensure that all bidders, proposers, vendors and contractors (collectively referred to herein as "bidders") doing business with the City provide to businesses owned and controlled by racial minorities and ethnic minorities and women, opportunities to participate, to the extent of their availability, on contracts which are paid, in whole or in part, with monetary appropriations from the City of Cincinnati.

In order to be considered as responsive, all bidders/proposers are required to use good faith efforts to promote opportunities for Minority and Women Business Enterprises to participate in and compete for, to the extent of their availability,

contracting, subcontracting, and purchasing opportunities. Prior to the award of any contract related to construction services or professional services, the City shall evaluate each bidder's documented efforts to achieve the participation of minority and women business enterprise firms. The extent of each bidder's commitment to non-discrimination will be evaluated on the basis of the bidder's demonstration of compliance with the following: 1) submittal of a non-discrimination plan that demonstrates the bidder's intent to utilize a diverse business base when awarding subcontracts, purchasing, and pursuing teaming opportunities; 2) agreement to execute a covenant of non-discrimination as a condition of contract award; 3) agreement to submit to ongoing monitoring by, and submittal of reports to, the City's Office of Contract Compliance after contract award, as continuing evidence of the contractor's commitment to non-discrimination; and 4) submitting to investigations or audits by the City's Office of Contract Compliance in connection with routine monitoring or as a result of specific allegations of discrimination.

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The City of Cincinnati prohibits discrimination against any person or business in pursuit of these opportunities on the basis of race, color, sex, religion, disability or national origin. The City will conduct its contracting and purchasing programs so as to discourage any discrimination and will vigorously seek to resolve all claims of discrimination.

General

The City of Cincinnati has established initiatives to ensure that firms seeking to participate in contracting and procurement activities are not prevented from doing so on the

basis of the race or gender of their owners. To implement these initiatives and ensure that businesses owned by minorities and women are not discriminated against with regard to subcontracting or other partnering opportunities the City of Cincinnati has developed a Non-Discrimination Program. Upon its successful implementation, the Non-Discrimination Program will result in utilization of minority and women owned firms to the extent of their availability, capacity and willingness to compete for work with the City of Cincinnati.

Program Requirements

All bidders, proposers, vendors, and contractors (collectively referred to herein as "bidders") are required to make efforts to ensure that minority and women owned businesses are not discriminated against on the basis of race, ethnicity or gender, and to demonstrate compliance with these Program Requirements at, or prior to, the time of bid opening.

The City of Cincinnati, or its designated agent, will evaluate efforts made by bidders to promote opportunities for minority and women owned firms (MBE/WBE) to compete for business as subcontractors and/or material or equipment suppliers at the time of bidding. A bidder is eligible for award of a City contract upon a finding by the City that the bidder has engaged in a good faith effort to ensure that its process of soliciting, evaluating and awarding subcontracts, placing orders, or partnering with other companies has been non-discriminatory. If the evaluation determines that a bidder has failed to achieve levels of minority and women business enterprise participation as might be reasonable on the basis of objective data regarding availability and capacity of such businesses, the bidder shall be subject to an inquiry by the Office of Contract Compliance.

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Diversity Database

The SBDOCC will maintain a database to assist bidders in identifying minority and women business enterprises with capabilities commensurate with general contracting requirements. A list from the database is available to contractors to assist them in their efforts to meet the Program's requirements. The list prepared from the database specifies which firms the City has determined meet the requirements necessary for designation as minority and women business enterprises. This list is not exhaustive and is frequently updated; therefore, if a bidder desires to utilize a firm not listed in the database, the bidder should confer with the Office of Contract Compliance to ascertain the eligibility of the minority or women business enterprises under consideration.

MBE/WBE Utilization Records and Reports

Contractors are required to maintain documentation regarding the utilization of minority and women business enterprises, and all other pertinent records, during the performance of award of their contract. Contractors shall submit with their monthly pay request Form 2005 "Subcontractor Monthly Business Utilization Report"

Compliance, Monitoring and Audit

The City of Cincinnati reserves the right to conduct a random audit of contract awardees' Non-Discrimination Plans to ensure compliance with the provisions of the Program.

Reporting Allegations of Discrimination

Businesses awarded City contracts shall prohibit discrimination against any person or business on the basis of race, color, sex, religion, disability or national origin. Such businesses shall develop a policy statement to be communicated regularly to all persons and entities involved in performance of their contracts, and shall conduct their contracting and purchasing programs so as to discourage any discrimination and to resolve all allegations of discrimination.

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The SBDOCC shall review and investigate all allegations of discrimination reported by minority and women business enterprise firms, as well as others claiming that prohibited forms of discrimination have occurred. Allegations of discrimination that are determined to have merit may be subject to penalties decided upon by the designated agency.

Subcontracting Outreach Program (CMC Section 323-31)

The Subcontracting Outreach Program applies to City-funded construction contracts of $100,000.00 or more. At the City's sole discretion, these requirements may be waived in advance on projects deemed inappropriate for subcontracting participation at the specified level. When State and/or federal funding sources require affirmative action

goals, those goals as defined in the contract documents replace requirements of this Subcontracting Outreach Program.

The City of Cincinnati is committed to maximizing subcontracting opportunities for all qualified and available Small Business Enterprises (SBEs). Bidders should be fully informed of the Subcontracting Outreach Program as set forth in this document.

Subcontractor Outreach and Participation Mandatory Goal of 20%

This Subcontracting Outreach Program requires bidders to make subcontracting opportunities available to a broad base of qualified subcontractors and achieve a minimum of 20% (which may be higher for construction of buildings) SBE subcontractor participation. To be eligible for award of this project, the SBE bidder must subcontract a minimum percentage of its bid to qualified available SBE subcontractors. The subcontractor participation mandatory goal will be evaluated on an annual basis to ensure the appropriateness of the goal. The bidder must list all subcontractors, regardless of amount. Failure to list subcontractors and subcontracting amounts with the bid sufficient to meet or exceed the mandatory subcontracting participation level may cause a bid to be rejected as non-responsive. Bidders or Offerors should be able to include the participation of minority and female firms at the levels of availability determined in the City of Cincinnati Disparity Study previously referenced. Each bid request or request for proposals shall contain the City of Cincinnati Office of Contract Compliance's most recent

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APPENDIX II
NON-DISCRIMINATION PROGRAM CONTRACT ADMINISTRATION POLICIES AND PROCEDURES

Introduction

The City of Cincinnati's new Non-Discrimination in Purchasing and Contracting policy requires changes in the way Bids, Request for Proposals (RFP) and Request for Qualifications (RFQ) and Request for Information (RFI) are reviewed and contracts are administered. Following are policies and procedures applicable to the SBDOCC, including bid package requirements, forms, outreach meeting information, availability determination and determination of compliance with program requirements.

Bid/RFP Package Requirements

Each bid package developed by the City of Cincinnati will include the following documents relative to the Non-Discrimination Program. The Contract Administrator and Purchasing Representative must ensure that these forms are included in each bid package:

1. Policy Statement—**City of Cincinnati Non-Discrimination Policy**

2. **Non-Discrimination Program** document—describes program in detail

3. **Offeror's Covenant of Non-discrimination (Form 2000)**—spells out the requirements of all bidders,

including good faith efforts, description of utilization of minority or women-owned business enterprises, reporting requirements and agreement to submit to interviews of officers and further inquiry from the City when required.

4. **Solicitation Certification Form (2001)**—lists names of firms contacted to bid as subcontractors.

5. **Statement of Good Faith Efforts (Form 2007)** --Offeror will provide a detailed description of the techniques used to obtain participation of minority and women-owned business enterprises, including segmenting of the work into 2 or more smaller units (areas for subcontracting), attending pre-bid conferences, soliciting specific minority and women-owned firms, soliciting trade associations that focus on minority and women-owned businesses, advertising efforts, and other methods used.

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If the bidder's utilization is the same as or greater than the actual availability percentage, then the city can accept the bidder's utilization as being in compliance with the program. The burden is on the bidder to explain the low utilization percentage. If the contract administrator determines that the contractor under-utilized minority and/or women-owned businesses based on the actual availability percentage, and that the bidder's good faith efforts were inadequate and there is no legitimate explanation for the under-utilization, then the matter is turned over to the investigative unit for a discrimination investigation.

7. If it is found that the bidder did in fact utilize good faith in attempting to subcontract with minority or women-owned businesses, then Contract Compliance should approve the bidder. The bidder's utilization percentage is then accepted.

8. After the contract is awarded and work has begun, the contractor still has a commitment to non-discrimination. Any proposed change in subcontractors from those indicated on Form 2004 must be approved by the city utilizing Form 2006.

9. The Office of Contract Compliance is responsible for monitoring the contract after award. The contractor must submit monthly reports (Form 2005) that indicate the name of the subcontractors and the amount they have been paid for the period and to date. The Contract Compliance Specialist/Officer assigned to the contract must review the forms and verify that the subcontractors have been paid as indicated. Site visits must also be conducted to ensure that the minority and/or women-owned business subcontractors actually have employees on the site on the dates indicated on the applicable forms.

Contract Administration - Request for Proposals or Request for Qualifications

In accordance with the RFP Manual, the initiating department must contact Purchasing before starting a project that may require an RFP or RFQ. This determination must be requested in writing. If Purchasing determines that an RFP is the proper mechanism, a written determination will be made. A copy of this determination should also be forwarded to the Contract Administrator. When the initiating department develops the

proposal documents, a copy should be forwarded to the Contract Administrator for review. The Contract

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Pre-Bid/Outreach Session Script for Contract Administrator

The following is a suggested script, which may be used to convey the nondiscrimination program's requirements during outreach meeting for applicable projects:

Good morning/afternoon.

I am (name), the Contract Administrator from the Small Business Division Office of Contract Compliance, Small Business Division of the Department of Community Development and Planning for the City of Cincinnati. I will briefly explain the requirements of the City's Non-Discrimination Program. In the bid package, you will find a section that begins with Non-Discrimination Program Policy, followed by the Non-Discrimination Program. All bidders must complete the forms in this section in order for a bid to be considered responsive. All bidders covenant specifically not to discriminate against minority and women-owned businesses in the bid process or the performance of a contract.

It is in the City's best interest to ensure equal opportunities for minority and women-owned businesses in the bid/proposal process and, ultimately, in the contract process based on their availability, capacity and willingness to perform. Therefore, you will also find in this section an availability estimate. This figure is a percentage based on a review of the City's vendors' database, including certified

minority and women-owned businesses. Businesses are identified based on the areas of work included in the specifications for this project. For this project, we estimate that __% minority and__% women-owned businesses are available to do the work required on this project.

Bidders are required to show that they've made a good faith effort to get the maximum practical participation of minority and women-owned businesses on this project. This doesn't mean that you are required to subcontract any of the work just to get participation by minority or women-owned firms, nor does it mean that you are required to subcontract if it is not the common and accepted industry practice on a project of this type. However, if it is feasible that the work can be broken into two or more smaller units, and then it should be done so as to permit maximum participation, based on the availability estimate.

Form 2001, must be used to list all firms solicited for subcontract work. Form 2003 lists the firms you plan to actually utilize on the project. The City maintains a list of certified minority and women-owned businesses on its web site and in the Office of Contract Compliance. Other information on showing a good faith effort is included in the bid package. If you have any questions or need assistance in meeting these requirements, please feel free to contact me at (phone number, email).

* * *

APPENDIX V

GUIDELINES FOR CONDUCTING INVESTIGATIONS OF DISCRIMINATION

Authorization To Conduct Investigations

The City of Cincinnati has established policy objectives to ensure that all citizens are afforded equal opportunities to do business on its contracts and to ensure that all bidders, proposers, vendors and contractors doing business with the City provide to businesses owned and controlled by racial minorities, ethnic minorities and women, opportunities to participate, to the extent of their availability, on contracts which are paid, in whole or in part, with monetary appropriations from the City. Accordingly, the City has reserved for itself the right to conduct, or appoint its duly authorized representative to conduct, investigations in response to allegations of discrimination in contracting and purchasing by or on behalf of the City. Guidelines for conducting investigations into alleged discriminatory acts are set forth below.

Initiation of the Investigatory Process

1. Upon its own initiative, the City may commence an investigation of discrimination against businesses in any given category of contracting or procurement to determine if an acceptable non-discriminatory reason, or other justification, exists to explain the disparity between the availability and utilization of M/WBEs on any given project.

2. Upon receipt of a signed complaint, by any person or group of persons, alleging discrimination by or against a contractor or vendor that has received a contract for goods and services, or a contractor or vendor that is pursuing the receipt of a contract for goods or services from the City, the City shall document the date and time of receipt of the complaint, and initiate or commence an investigation to ascertain the merits of the charge of discrimination and to determine if a non-discriminatory reason exists to explain the alleged discrimination.

3. The complaint shall be made in writing and signed by the aggrieved party. It shall then be delivered to the City's Office of Contract Compliance in person, by mail or overnight delivery service. Faxed copies will be accepted if followed by a signed, notarized original within three (3) days of the faxed copy being received at the City's Office of Contract Compliance.

4. Any complaint alleging discrimination may be withdrawn by the aggrieved party, or parties, within ten (10) days of submission; however, after the party against who the allegation has been made has been notified, the complaint can only be withdrawn upon agreement of all parties involved.

5. Each and every complaint of discrimination shall contain the following:

    a) The full name, address and telephone number for the aggrieved person or persons.

    b) The full name, address and telephone number of the person and/or entity against which the

complaint is made (hereinafter referred to as the respondent).

c) A clear and concise statement of the facts and circumstances giving rise to the allegation of disparity or discrimination, including but not limited to dates, times, locations, witnesses to any aspect of the events, and all other relevant information in the possession of the complaining party.

d) Notwithstanding the foregoing, a complaint that alleges discrimination shall be deemed sufficient if the written statement is precise enough to identify the parties and to generally describe the practices complained of, or the grievance alleged.

e) A party may cure a technical defect in the complaint or response by amendment within ten (10) days after the defect is made known to the party by the City.

6. Within ten (10) days after filing a complaint of discrimination, the City or its designee shall serve the respondent a copy of the complaint by mail or in person, except when the service of the actual complaint will impede the investigation functions of the City, in which case, the City shall provide notice to the respondent that a complaint has been filed against it and provide fifteen (15) days in which the respondent can provide a response, if any, to the allegations of discrimination. The notice shall include the date, place and circumstances of the alleged discriminatory conduct, but will not include the identity of the complaining party.

7. Within five (5) working days after receipt of the complaint alleging discrimination, the City or its designee shall acknowledge same in writing and assign a case number and investigator with whom the complaining party shall communicate all further information for processing.

Investigation of Complaints of Discrimination

1. Upon receipt of a complaint alleging discrimination, the City, or its duly authorized agent or representative, shall conduct an investigation into the merits to determine if a non-discriminatory reason or reasons exist to justify the discrimination set forth in the allegations. In conducting the investigation, the City may utilize the services of any local, state or federal agency that is charged with the investigation and resolution of civil rights violations or enforcement of any laws, local, state or federal that relate, in any way to discriminatory treatment.

2. The City may accept any statement of position or evidence with respect to the allegations contained in a complaint, or other information which the claimant or the respondent wishes to submit. The duly authorized representative of a complaining party or respondent shall be entitled to submit evidence or information in the same manner as the complaining party or respondent.

3. As part of the investigation process, the City may require the person submitting the complaint to provide additional statements, which may include any or all of the following; 1) A statement of each specific act of discrimination that the claimant has suffered and the dates, which such harm, occurred; 2) For each alleged act of discrimination, a statement specifying the act, policy or practice, which is alleged to be discriminatory. 3) For each act, policy or

practice alleged to have caused harm to the aggrieved party, a statement of the facts that lead the person to believe that the act, policy or practice is discriminatory.

4. The City may require a fact-finding conference with the parties, after receipt of the respondent's reply, but prior to moving forward with investigation of the complaint. The conference is primarily designed to define the issues; to determine which elements are undisputed; to resolve those issues that can be resolved; and, for those issues which cannot be resolved, to establish the framework for the proceeding with the remaining investigation.

5. Respondents to complaints of discrimination must reply with specificity and particularity to each allegation of the complaint.

Request for Documents and Information

1. The City's representative, in conducting the investigation, may issue, or cause to be issued any requests for the production of documents and requests for other evidence, including requiring; 1) The attendance and testimony of witnesses; 2) The production of evidence which shall include but not be limited to books, records, correspondence or any other documents in the possession or under the control of the person or party to whom the request is directed; 3) Access to any other evidence for the purposes of examination and copying for the City's determination.

2. The request for information shall state the name and address of the issuing official or duly authorized representative of the City, the person to whom it is addressed, the place, date and time for attendance and the

nature of the evidence to be examined and copied. Neither the complaining party nor the respondent shall have a right to demand the issuance of a request for information, as this power rests in the sole discretion of the City or its duly authorized representative, assigned to investigate the complaint.

3. In the event that a party to whom a request for information has been issued, refuses or intends to refuse, to comply with the directives contained therein, he or she must notify the City in writing within three (3) days after receipt thereof and request in writing a waiver of compliance, stating with particularity the reasons for said waiver. The City's investigator shall notify the party requesting the waiver of the grant or denial of it within three (3) days.

4. If a party who is served with a request for information does not comply and does not request a waiver, or if a requested waiver is not granted, and the party does not comply with the request for information, the City shall use its discretion to impose appropriate penalties for non-compliance.

5. To further effectuate the purposes of the City's duties and responsibilities in the prompt investigation and resolution of complaints of discrimination, the City may require a party or witness to appear in person at a stated time and place to be examined, under oath, by a Hearing Officer or other duly authorized If a party or witness refuses to appear, or appears and refuses to testify, the City shall, in its discretion, impose appropriate penalties for non-compliance.

Summary Disposition of Complaints and Information

The City reserves the right to apply these guidelines in conducting its investigations into allegations of discrimination in contracting and procurement; however, the City also recognizes that there may be instances in which sufficient information is available to allow for summary disposition of complaints without going through each of the steps outlined herein. To that end, the following guidelines for summary disposition of complaints should be followed:

1. If a preliminary investigation by the City or its duly authorized representative discloses that the complaint, on its face, does not state a claim of discrimination, the City may dismiss the complaint.

2. Where a person who has filed a complaint does not provide the requested information or refuses to appear or be available for appropriate interviews with the City or its duly authorized representative, or in any other manner, refuses to cooperate, the City may dismiss the complaint after extending to the charging party a ten (10) day period in which to comply.

APPENDIX D

FORM 2000

CITY OF CINCINNATI
OFFEROR'S COVENANT
OF NON-DISCRIMINATION

Pursuant to the City of Cincinnati's policy of non-discrimination, specifically in its purchasing and contracting practices, by our signature below and as a condition of contract award, we covenant, represent and warrant that:

- We will not discriminate against small, minority and women-owned business enterprises on the basis of race, ethnicity or gender in the process of contracting, subcontracting and purchasing;

- We will use good faith efforts to promote opportunities for minority and women-owned business enterprises to participate in and compete for opportunities to the extent of their availability and capacity;

- We will submit all required forms that indicate our intent to use a diverse business base when awarding subcontracts, purchasing and pursuing teaming opportunities;

- If awarded the contract, we will submit to ongoing monitoring by and submittal of reports to the City's Office of Contract Compliance;

- We will submit to investigations and/or audits by the Office of Contract Compliance in connection with routine monitoring or as a result of specific allegations of discrimination.

_____ _____

Company Representative (Name, Title) Date

28b

Form 2001

CITY OF CINCINNATI
NON-DISCRIMINATION/SUBCONTRACTING
OUTREACH PROGRAM

Solicitation Certification Form

[Fold out Exhibit, next page]

rm 2001
JBMIT WITH
D/PROPOSAL)

CITY OF CINCINNATI
NON-DISCRIMINATION/SUBCONTRACTING OUTREACH PROGRAM
Solicitation Certification Form

)MPANY NAME:	ADDRESS/TELEPHONE:
D PACKAGE:	BID DATE:

ease list the name(s) of all firms contacted, and their responses to the above Bid package. If additional space is required, this form may be duplicated.

Name/Address	Type Of Business and Ownership	Type Of Work/Service(s) Solicited	Indicate How Businesses Were Contacted (i.e. Letter, Phone, Fax)	Response To Solicitation (i.e. Will Submit Bid, No Response, Not Interested)	Amount of Bid or Quote	Company Selected? Yes or No	Telephone Fax Number

s hereby certified that the above firms were contacted and offered an opportunity to propose on the above procurement. We further certify that the above statements are a true 'ount of all firms' responses to our solicitation. We have also attached copies of all bids and/or quotes received. For work we will perform with our own forces, we have indicated ve with our own costs.

mpany Representative (Name/Title)

Date

Form 2002

City of Cincinnati
JOINT VENTURE AGREEMENT AFFIDAVIT

(Completion of this form is only required when the contractor enters into a joint venture agreement with a Minority and/or Women Business Enterprise firm)

(Form 2002 must be completed in its entirety)

1. Name of Joint Venture firms:

   Majority contractor_____

   Minority firm_____

   Women Firm_____

2. Provide a copy of written joint venture agreement.

3. Indicate the joint venture percentage of each company

   a) Majority Contractor_____%

   b) Minority Firm_____%

   c) Women Firm_____%

Signature & Title_____
(Majority Firm)

Date_____

Signature & Title_____
(Minority Firm)

Date_____

Signature & Title_____
(Women Firm)

Date_____

Contract Compliance____ Approved____ Denied

Signature:_____

31b

Form 2003

CITY OF CINCINNATI
SUBCONTRACTOR UTILIZATION PLAN

Form 2004

City of Cincinnati
SUBCONTRACTOR APPROVAL REQUEST
Statement of Intent to Utilize Firms

Form 2005

CITY OF CINCINNATI
SUBCONTRACTOR MONTHLY BUSINESS
UTILIZATION REPORT
Record of Payments

[Fold out Exhibits, next 3 pages]

03

CITY OF CINCINNATI
SUBCONTRACTOR UTILIZATION PLAN

THIS DOCUMENT MUST BE PROVIDED WITH BID AND SIGNED BY THE PERSON SIGNING THE PROPOSAL

)CUREMENT DESCRIPTION:	**DATE SUBMITTED:** **TOTAL CONTRACT VALUE $:**
)IPANY NAME: **FEDERAL TAX ID#**	**ADDRESS/TELEPHONE:**

The above named company proposes to use the services of the following listed firms.

Name/Address/Telephone	Ownership Status	Certifying Agency	Federal Tax ID#	Type Of Work	Subcontract Dollars	Subcontract Percentage

Business Ownership Status
Minority Owned - MBE
Women Owned - WBE
White Owned - WOB
Small Business Enterprise - SBE
Other - Non certified MBE/WBE

Total MBE	$	%
Total WBE	$	%
Total White	$	%
Total SBE	$	%
Total Other	$	%

I certify that the above information is true to the best of my knowledge. I understand that any changes to the above must be submitted in writing on the Substitution Form and approved in advance by the City.

iure	**Title**	**DATE**

FORM 2004

City of Cincinnati
SUBCONTRACTOR APPROVAL REQUEST
Statement of Intent to Utilize Firms

THIS FORM MUST BE COMPLETED AND SUBMITTED TO CONTRACT OFFICER PRIOR TO CONTRACT AWARD
INFORMATION RECORDED HEREIN WILL BE INCORPORATED IN THE AWARDEES' CONTRACT

PROJECT NAME			CONTRACT NO.	
City Agency Administering/Contract	Contact Person		Phone No.	
Requesting Contractor	Federal Tax ID	Address		Zip Code
Authorized Representative	Title		Phone No.	
Prime Contractor (If not the same as above)	Federal Tax ID	Address		Zip Code

SUBCONTRACTOR

SUBCONTRACTOR	Federal Tax ID	Address		Zip Code
Authorized Representative	Title		Phone No.	
Is SBE registered with the City of Cincinnati? YES ☐ NO ☐ Minority ☐ Female ☐				

ITEM NUMBER	DESCRIPTION OF WORK	SUBCONTRACT'S CONTRACT AMOUNT $	% OF TOTAL CONTRACT PRICE	ESTIMATED START DATE	COMPLETION DATE
	Total Value of Work				

SIGNATURES

SUBCONTRACTOR		DATE
Requesting Contractor		DATE
Prime Contractor (If not the same as above)		DATE
Specialist Initial/Date	Contract Compliance Officer	DATE
Contract Administering Agency		DATE

2005

CITY OF CINCINNATI
SUBCONTRACTOR MONTHLY BUSINESS UTILIZATION REPORT
Record of Payments

THIS DOCUMENT MUST BE SUBMITTED WITH MONTHLY INVOICE

ECT NAME: CONTRACT#:	DATE FORM SUBMITTED: WORK PERIOD ENDING:
PANY NAME:	ADDRESS:
RAL TAX ID#:	CONTACT PERSON:

bcontractor/Vendor ID# (rect Address/Zip/Telephone)	Indicate Ownership Status	Description Of Work	Total Sub-Contract Amount	Amount Paid For The Period	Total Amount Paid To-Date	Percentage Of Work Completed	Scheduled Start Date	Scheduled End Date

MBE Subcontracts Awarded/%	$	%	Total WBE Subcontracts Awarded/%	$	%
MBE Dollars Paid-To-Date/%	$	%	Total WBE Dollars Paid-To-Date/%	$	%
Non-Minority Subcontracts Awarded/%	$	%	Total SBE Subcontracts Awarded/%	$	%
Non-Minority Dollars Paid-To-Date/%	$	%	Total SBE Dollars Paid-To-Date/%	$	%

signed certifies that the information recorded above is correct, and that each of the representations set forth above is true. The undersigned further acknowledges that any misrepresentation herein may result in termination of contract revocation under applicable Federal and State laws concerning false statements and false claims.

any Representative_____ Title:_____ Date:_____

Form 2006

City of Cincinnati
SUBCONTRACTOR SUBSTITUTION

THIS FORM MUST BE COMPETED AND SUBMITTED TO THE CONTRACT COMPLIANCE OFFICER PRIOR TO TERMINATING THE CONTRACT OF A MINORITY, SMALL OR WOMEN-OWNED BUSINESS AFTER THE BIDS HAVE BEEN SUBMITTED OR CONTRACT HAS BEEN AWARDED. INFORMATION RECORDED HEREIN WILL BE INCORPORATED IN THE AWARDEE'S CONTRACT.

Company Name:_____ Project Name:_____

Address:_____Date Submitted:_____

_____will be substituted for
(Name of Subcontractor/Supplier)
_____ to perform work on the
(Name of Subcontractor/Supplier)

the above project as (check one): [ ] a partnership;[ ] a corporation; [ ] sole proprietorship; [ ] a joint venture.

_____ will enter into a formal
(Subcontractor/Supplier)

agreement for the work upon approval by the **City of Cincinnati**.

ITEM NUMBER	DESCRIPTION OF WORK	SUBCONTRACT/P.O. PRICE	% OF TOTAL CONTRACT PRICE	START DATE	COMPLETION DATE
	Total Value of Work				

Prime/General Contractor:

Signature of Company Representative_____

Title:_____ Date:_____

Federal Tax ID#:_____ _____

Subcontractor/Supplier:

Signature of Company Representative_____

Title:_____Date:_____

Federal Tax ID#:_____

Contract Compliance_____Approved_____Denied

FORM 2007

CITY OF CINCINNATI
STATEMENT OF GOOD FAITH EFFORTS

Bid Number_____

By the signature below of an authorized company representative, we certify that we have utilized the following methods to obtain the maximum practicable participation by small, minority and women-owned business enterprises on this project. Please indicate which methods you used by placing an **X** in the appropriate place.

_____ Attended one of the quarterly S/M/WBEs Outreach Sessions

_____ Contacted Contract Compliance to obtain list of certified S/M/WBEs

_____ Contacted trade associations that focus on small, minority and women-owned businesses (indicate which associations were contacted)

_____ Identified sufficient subcontracting work to meet goal (attach content of advertisements and written notices to subcontractors indicating type ofwork to be subcontracted)

_____ Contacted recruitment/placement agencies (attach copy of each letter sent; if faxed, include transmittal confirmation; if mailed, attach copy of envelope or certified mail receipt)

_____ Written Notice to Subcontractors (submit copy of each letter sent, or, if one master notification, submit copy of letter and recipient list)

_____ Follow-up to initial solicitations (submit copy of call logs)

_____ Advertising (attach content of advertisements, which must include project name, bidder, work available, contact person's name and number, information on availability of plans and specifications and bidder's policy concerning assistance to subcontractors in obtaining bonds, credit lines and/or insurance; date of advertising and publications)

_____ Assistance with bonds, credit lines, insurance (submit copy of advertising and written notices to subcontractors)

_____ Other (please list any other methods utilized that aren't covered above)

_____

_____

_____

_____ _____

Company Date

_____

Company Representative (Name and Title)

FORM 2008

City of Cincinnati
SUBCONTRACTING OUTREACH PROGRAM
Final Subcontracting Report

THIS FORM MUST BE COMPLETED AND SUBMITTED TO CONTRACT OFFICER WITHIN FIFTEEN (15) DAYS AFTER FINAL INSPECTION OF CONTRACT WORK

Company Name:_____Project Name:_____

Address:_____

Federal Tax ID#_____ Date Submitted:_____

Date of Final Inspection_____

The following subcontractors performed work on the above project:

TYPE OF WORK	COMPANY NAME/TAX ID #	FINAL PRICE	% OF TOTAL CONTRACT PRICE

Signature of Company Representative_____
Title:_____ Date:_____

Contract Compliance____ Approved____Denied

Bidder's Telephone Log

Date	Time	Person Calling	Company Called/ Contact	Telephone Number	Result of Conversation

APPENDIX E

CONSTRUCTION
BID DOCUMENT

CITY OF CINCINNATI
DIVISION OF PURCHASING
805 Central Ave., Suite 234, Cincinnati, Ohio 45202-1947

FORM 1-C (10/2002)

Proposal submitted by:
Cleveland Construction, Inc.
Name of Bidder (Print or Type)

This space for City Use Only	
BOND	**CHECK**

COPY OF LEGAL NOTICE - BID WANTED

Reference No. 04IC909008
Date December 23,_____

Buyer N. Mullanney

Phone 513-352-1538

Commodity Class 099-01-01

Sealed bids will be received at the office of the City Purchasing Agent, Two Centennial Plaza, 805 Central Ave.,

Suite 234, Cincinnati, Ohio, 45202-1947 until **12 o'clock noon, Cincinnati time, Thursday, February 5, 2004**, at which time they will be opened and publicly read, for furnishing the labor, materials, tools, supplies, equipment, services, and supervision necessary for applying the material and/or doing the work necessary for the repair, construction or improvement, as the case may be, as indicated by the items hereunder listed and in accordance with the applicable specifications. Individual lump sum bids are invited. Sealed bids will be received for the following:

Cincinnati Convention Center Expansion and Renovation
Cincinnati, Ohio

Bid Package C
TC-09A Drywall

A pre-bid meeting is scheduled for 1:00 p.m. on Tuesday, January 6, 2004 at the Cincinnati Convention Center, Room 206, located at 525 Elm Street, Cincinnati, Ohio 45202. (Bidders are advised to enter the Cincinnati Convention Center on the Skywalk Level at 6th and Plum.)

Bidders shall submit all questions in writing (fax or U.S. mail is acceptable — e-mail is unacceptable) to the Construction Manager regarding the bid by 5:00 p.m. Wednesday, January 21, 2004. Questions received after that time will not be addressed.

Owner: City Of Cincinnati
805 Central Avenue, Suite 610
Cincinnati, Ohio 45202
513/352-5270 and FAX 513/532-5336

Construction Manager: Hunt Construction Group

619 Central Avenue, Suite A
Cincinnati, Ohio 45202
513/421-3500 and
FAX 513/632-9330

Design Architect:

LMN Architects
501 Norton Building
801 Second Avenue
Seattle, Washington 98104
206/682-3460 and
FAX 206/343-9388

Architect of Record:

Cincinnati Architects Collaborative
332 East 8th Street
Cincinnati, Ohio 45202
513/241-8700 and
FAX 513/241-8873

Program Manager:

URS Corporation
619 Central Avenue, Suite B
Cincinnati, Ohio 45202
513/632-9343 and
FAX 513/632-9350

Bidders may purchase bid documents from Ohio Blueprint Company, 2348 Gilbert Avenue, Cincinnati, Ohio 45206, 513/281-9933. Bidders are required to purchase all Volumes of the Project Manual. The Construction Drawings for this Bid Package can be purchased on a voluntary basis. However, all Bidders are responsible for all information contained in the documents that are released for this Bid Package and the Bidders are responsible to coordinate the work with all drawings and specifications of all Bid Packages including those previously released, if any exist. All drawings and specifications are available for review at the office of the

Construction Manager. Bidder also has the option to purchase any drawings and/or specifications previously issued for the Project if any exist Bid documents may be examined at:

Allied Construction Industries
1010 Yale Avenue
Cincinnati, Ohio 45206
513/221-8020

Hunt Construction Group, Inc.
619 Central Avenue, Suite A
Cincinnati, Ohio 45202
513/421-3500

Builders Exchange Cleveland
981 Keynote Circle, Suite 1
Brooklyn Heights, Ohio 44131
866/661-8302

Ohio Statewide Minority Business Development Center
7162 Reading Road, Suite 630
Cincinnati, Ohio 45237
513/631-7666

Builders Exchange Louisville
2300 Meadow Drive, Suite 100
Louisville, Kentucky 40218
502/459-9800

Reed Construction Data
4100 Executive Park Drive, Suite 405
Cincinnati, Ohio 45241
513/956-4210

Dayton Builders Exchange
2077 Embury Park Road
Dayton, Ohio 45414
937/278-5723

Reed Construction Data
7654 Crosswoods Drive
Columbus, Ohio 43235
614/880-3900

F. W. Dodge Corporation
655 Eden Park Drive, Suite 515
Cincinnati, Ohio 45202
513/345-8200

South Central Ohio Minority Business Council
441 Vine Street, Suite 300
Cincinnati, Ohio 45202
513/579-3104

Greater Cincinnati & Northern Kentucky
African American Chamber of Commerce
2945 Gilbert Avenue
Cincinnati, Ohio 45206
513/751-9900

Unless otherwise specifically indicated under the individual listing in the legal advertisement, all bids shall be subject to the following

a) BID GUARANTY AND CONTRACT BOND: Each Bidder is required to submit with the bid a Bid Guaranty and Contract Bond. The Bid Guaranty and Contract Bond must be submitted with the bid using the form provided herein as none other will be accepted.

b) All bidders will be subject to the provisions of the City of Cincinnati Contract Compliance Programs regarding Equal Employment Opportunity and Small Business Enterprise Program. Failure of a bidder to comply with these requirements at the time of the bid may be cause for rejection of the bid.

c) The City reserves the right to waive informalities not inconsistent with law or to reject any or all bids.

d) Submitted bids shall not be withdrawn for a period of ninety (90) days following the date of bid opening.

The bid documents SHALL be returned intact. FAXED or ELECTRONICALLY MAILED bids are *UNACCEPTABLE.* Bids *must* be signed and signature *must* be original.

Specifications and Drawings referred to in this bid document by reference only, need not be submitted with the bid.

INVITATION TO BID

Sealed bids are requested on the list of materials, supplies, equipment or services set forth herein, subject to all conditions outlined the Bid Documents, including General Conditions, Instructions to Bidders, and Information for Bidders as follows.

LEGAL NOTICE / INVITATION TO BID / FORM 1-C

66

(3)

FILED
SEP 7 - 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-113

In the Supreme Court of the United States

CITY OF CINCINNATI,

Petitioner,

v.

CLEVELAND CONSTRUCTION, INC.,

Respondent.

On Petition for a Writ of Certiorari to the Ohio Court of Appeals, First Appellate District

PETITIONER'S REPLY BRIEF

JULIA L. MCNEIL
CITY SOLICITOR
RICHARD GANULIN*
MARY FRANCES CLARK
ASSISTANT CITY SOLICITORS
ROOM 214, CITY HALL
801 PLUM STREET
CINCINNATI, OH 45202
(513) 352-3329
(513) 352-1515 FAX
richard.ganulin@cincinnati-oh.gov

**Counsel of Record*

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

Whether strict judicial scrutiny applies to a municipality's discretionary "lowest and best bid" determination that, as part of a non-exhaustive list of factors, includes permissive consideration of bidders' good faith outreach efforts to use minority-owned and women-owned subcontractors.

LIST OF PARTIES

Petitioner: City of Cincinnati

Respondent: Cleveland Construction, Inc.

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STATEMENT OF THE CASE

This case at bar concerns the lower courts' injunction granting Cleveland Construction's *facial* challenge barring the City from providing equal opportunity to participate in City subcontracts to minority-owned and women-owned businesses. The Brief in Opposition creates the erroneous impression that the challenged City of Cincinnati procurement system was *applied* to deny Cleveland Construction the Convention Center drywall bid. That did not happen. Instead, as the Court of Common Pleas held: "As applied in this case, however, those unconstitutional elements did not cause Cleveland to lose the contract award, rather, Valley was awarded the contract because of its higher SBE subcontracting percentage as calculated *without regard to race or gender.*"[1] The Court of Common Pleas further held:

> The trial elicited no testimony, however, that the City in fact gave weight to bidders' compliance with MBE or WBE availability estimates in making the contract award with regard to subcontracting percentages. Plaintiff failed to establish that City officials looked beyond whether drywall bidders met the City's 35% SBE [race and gender neutral small business] requirement . . . .The evidence indicates that the City awarded the contract to Valley, and not to Cleveland, because Valley's bid complied with the City's [race and gender neutral] requirement that 35 percent of the

---

[1] App. 63 (emphasis added).

work go to small business enterprises and Cleveland's bid did not.[2]

Furthermore, the Court of Common Pleas emphasized: " . . . Cleveland has not established that the City's race and sex based classifications (as opposed to the City's small business preference) resulted in the loss of the contract award."[3] Nevertheless, the lower courts did prospectively enjoin operation of that part of the City's procurement system designed to provide equal opportunity to participate to minority-owned and women-owned subcontractors.

REASONS FOR GRANTING THE WRIT

I. The Equal Protection Question Presented in This Petition is the Question Left Unanswered in *Parents Involved in Community Schools v. Seattle School District No. 1*, 127 S.Ct. 2738 (June 28, 2007).

In its Brief in Opposition, Cleveland Construction disregards the "lowest and best bid" character of the City's procurement system and instead focuses on the documentation, review, and anti-discrimination elements of the City's small business enterprise program.[4] Those

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[2] App. 70-71. It is uncontroverted that the small business requirement is race and gender neutral.

[3] App. 71-72.

[4] The Cincinnati Municipal Code sections providing for subcontractor outreach and for non-discrimination in purchasing and contracting were included in the Petition for Writ of Certiorari, pp. 2-11. The regulations authorized by the Municipal Code were provided in Cleveland Construction's Brief in Opposition, pp. 6-10.

elements are described by the Court of Common Pleas in its decision.[5] They effectuate the City's interest in providing minority-owned and women-owned businesses equal opportunity to participate in City contracts. Like the City's permissive consideration of the subcontractor outreach element described in the Petition for Writ of Certiorari, the purpose and effect of the documentation, review, and anti-discrimination provisions are simply to provide equal opportunity to participate. As explained in the Petition for Writ of Certiorari, the City's "lowest and best bid" procurement decision is based on permissive consideration of a non-exhaustive list of factors including contractors' good faith outreach efforts to use minority-owned and women-owned subcontractors.

Cleveland Construction's Brief in Opposition highlights the difference between the clear standard established in *Parents Involved in Community Schools v. Seattle School District No. 1*[6] ("racial classifications" resulting in *mandatory* government decisions based *solely* on race are subject to strict judicial scrutiny) and the lower courts' broader and vaguer subjection of the City's program to strict scrutiny. The regulatory provisions cited and quoted by Cleveland Construction do not result in a mandatory City decision based solely on race or sex. Rather, the regulations reasonably

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The regulations advance the ordinance objective of promoting equal opportunities for minority-owned and women-owned subcontractors by establishing documentation and anti-discrimination investigatory requirements. The regulations do not mandate the imposition of a government benefit or detriment based solely on race.

[5] App. 66-69.

[6] 127 S.Ct. 2738 (June 28, 2007).

provide minority-owned and women-owned businesses equal opportunity to participate in City contracts.

The Court of Common Pleas even held that "the law does not prohibit governmental entities from recording statistics relating to race or gender, or from tracking the progress of groups as identified by such categories, or from seeking to ascertain whether any impermissible, discriminatory barriers are hampering the advancement of individuals within groups as defined by race or gender."[7] The regulations reduce the likelihood of unlawful discrimination by contractors based on race or sex. In determining the "lowest and best bid," Cincinnati Municipal Code Section 321-37(c)[8] provides a non-exhaustive list of factors that permits, but does not mandate, consideration of compliance with any of the relevant regulations. The regulations do not mandate discrimination based on race or sex and, therefore, are not subject to the strict scrutiny equal protection standard expressed in the *Parents Involved in Community Schools* case.

II. The Strict Scrutiny Rule of *Adarand Constructors v. Pena* and the Federal Circuit Cases Cited Below Does Not Apply to a Discretionary, Non-Mandatory Municipal Outreach/Tracking Program Designed to Promote Equal Opportunities for Minority-Owned and Women-Owned Businesses.

Cleveland Construction erroneously asserts that the City's subcontracting outreach program is indistinguishable in its effects from the automatic race-based financial incentive

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[7] App. 65.

[8] App. 2-3.

program in *Adarand*.[9] The City concedes that "racial classifications" mandating government preferences based solely on race are subject to strict scrutiny. However, there is a fundamental difference between the "racial classifications" in *Adarand* that created automatic financial incentives in favor of only certain races and the City's subcontracting outreach program which does not.

Adarand involved the award of a United States Department of Transportation contract providing in part that the prime contractor "would receive additional compensation if it hired subcontractors certified as small businesses controlled by 'socially and economically disadvantaged individuals.'"[10] Adarand sought the subcontract for the guardrail portion of the contract and submitted the low bid, but the prime contractor instead chose to award the guardrail subcontract to another company certified as a small business according to the terms of the prime contract.[11] The prime contractor testified that Adarand's bid would have been accepted "had it not been for the additional payment it received by hiring Gonzales [the race-based certified small disadvantaged business subcontractor] instead."[12]

The incentive at issue in *Adarand* was automatically made available to those contractors who subcontracted with race-based certified small disadvantaged businesses, thereby creating a preference in the awarding of subcontracts in favor

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[9] Brief in Opposition, p. 23.

[10] *Adarand Constructors v. Pena*, 515 U.S. 200, 205 (1995).

[11] *Id.*

[12] *Id.*

of one group of subcontractors. By contrast, Cincinnati Municipal Code Section 321-37 does not provide an automatic financial incentive to subcontract with minority-owned and women-owned businesses. Rather, the City's ordinance creates two separate levels of discretion when awarding a contract and does not mandate an automatic financial incentive to contractors to use minority-owned or women-owned subcontractors. Cincinnati Municipal Code Section 321-37(a) requires that the City's purchasing agent award contracts to the lowest and best bidder. "Lowest and best" is a discretionary standard under Ohio law. Cincinnati Municipal Code Section 321-37(c) creates a further level of discretion by providing a nonexhaustive list of factors that *may* be used by the City's purchasing agent when determining the lowest and best bid. This Cincinnati standard does not mandate a certain result when awarding a public bid, unlike the situation in *Adarand* creating racial classifications virtually guaranteeing that the prime contractor would use a race-based certified subcontractor.

Adarand, as clarified by *Parents Involved in Community Schools*, essentially established that a mandatory government decision based solely upon a racial classification is subject to strict scrutiny. The federal circuit courts interpreting *Adarand* in the years preceding *Parents Involved in Community Schools* variously applied strict scrutiny both to governmental programs that were functionally equivalent to decisions mandated based solely upon race and to governmental programs that were not mandates. Cleveland Construction and the lower courts overbroadly misconstrued the holdings of the federal circuit court cases in relation to the case at bar.

For example, in *Lutheran Church-Missouri Synod v. FCC*,[13] the D.C. Circuit Court majority justified its conclusion that the FCC regulations were subject to strict scrutiny by reference to a mandate based solely on race: "*The imposition of numerical norms based on proportional representation—which is the core element to what are often referred to as affirmative action, set aside, or quota programs—is the aspect of the Commission's rule that makes it impossible for us to apply any standard of review other than strict scrutiny.*"[14]

In *Monterey Mechanical Co. v. Wilson*, a California statute required general contractors to either subcontract a certain percentage of their work to minority, women and disabled veteran-owned subcontractors or to demonstrate good faith efforts to meet this percentage.[15] Contractors who failed to meet this requirement would not be awarded state contracts.[16] In finding that this program was a racial classification subject to strict scrutiny, the *Monterey Mechanical* court noted that the "statute does not require set-asides, but it encourages them."[17]

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[13] 141 F.3d 344 (D.C. Cir. 1998), *petition for rehearing en banc denied*, 154 F.3d 487 (D.C. Cir. 1998).

[14] 154 F.3d 487 at 492 (emphasis added).

[15] 125 F.3d 702 (9th Cir. 1997).

[16] *Id.* at p. 710.

[17] *Id.* at p. 711.

In *Safeco Ins. Co. of America v. White House*,[18] the Sixth Circuit found that strict scrutiny applies where "outreach" "'indisputably pressures' contractors to hire minority subcontractors."[19] Under that ruling, if an outreach program does not mandate the government hiring of minority-owned firms, strict scrutiny does not apply.

In each of these cases, the program at issue either was functionally equivalent to a set-aside or contained certain components that effectively favored certain subcontractors over others. By contrast, the purpose of the City's program is to discourage discrimination and provide equal opportunities for all businesses to participate in the public contract process.[20] The program does not mandate set-asides, quotas, or any other type of affirmative action. Strict scrutiny is inapplicable to those situations in which a governmental program does not mandate decisions based solely on racial classifications. Furthermore, the City's promotion of equality

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[18] 191 F.3d 675 (6th Cir. 1999).

[19] *Id.* at 692.

[20] The City of Cincinnati's non-discrimination policy under Cincinnati Municipal Code Section 321-159 states in relevant part that "the policy of the City of Cincinnati [is] that its purchasing and contracting policies not implicate the City as a passive participant in discriminatory practices engaged in by private contractors or vendors who seek to obtain business with the City. In furtherance of these policy objectives, the City seeks to afford to its citizens *equal opportunities* to do business on City contracts and to ensure that all bidders . . . doing business with the City provide to businesses owned by racial minorities and ethnic minorities and women *opportunities to participate*, to the extent of their availability, on [City] contracts . . . ." Brief in Opposition App. 8b (emphasis added).

of opportunity and non-discrimination is functionally dissimilar to the programs subject to strict scrutiny identified in *Adarand*, *Parents Involved in Community Schools*, and the federal circuit court decisions relied upon by Cleveland Construction and the lower courts.

III. The Court Has Jurisdiction Under 28 U.S.C. §1257

In its Brief in Opposition, Cleveland Construction first concedes that "an order from the highest court of the State, in this case, the Supreme Court of Ohio, denying discretionary review is a final judgment that may be appealed to this Court . . . ." It then concludes that "there has not been a 'final judgment' within the meaning of 28 U.S.C. §1257."[21] The equal protection question presented in the Petition for Writ of Certiorari concerning the injunction issued by the lower courts is unrelated to the retrospective liability and damages issues pending in the Supreme Court of Ohio. Therefore, the order from the Supreme Court of Ohio denying its review of the equal protection question concerning the injunction is a final judgment within the jurisdiction of this Court. Alternatively, as requested in the Petition for Writ of Certiorari, the City requests that the Court remand for further consideration in light of the decision in *Parents Involved in Community Schools v. Seattle School District No. 1*.

CONCLUSION

For the foregoing reasons, and as further discussed in the Petition for Writ of Certiorari, the Court should grant the petition. The Court should rule that, without subjecting themselves to strict judicial scrutiny, government entities may

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[21] Brief in Opposition, pp. 16-17.

provide equal opportunities for minority-owned and women-owned firms to participate in government contracts.

Respectfully submitted,

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